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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

6499

ELECTRIC BOND AND SHARE COMPANY, AMERICAN GAS AND ELECTRIC COMPANY, AMERICAN POWER & LIGHT COMPANY, NATIONAL POWER & LIGHT COMPANY, ELECTRIC POWER & LIGHT CORPORATION, UNITED GAS CORPORATION, POWER SECURITIES CORPORATION, LEHIGH POWER SECURITIES CORPORATION, UTAH POWER & LIGHT COMPANY, NEBRASKA POWER COMPANY, PACIFIC POWER & LIGHT COMPANY, UNITED GAS PUBLIC SERVICE COMPANY, HOUSTON GULF GAS COMPANY, APPALACHIAN ELECTRIC POWER COMPANY, ATLANTIC CITY ELECTRIC COMPANY, EASTON CONSOLIDATED ELECTRIC COMPANY, THE OHIO POWER COMPANY, PENNSYLVANIA POWER & LIGHT COMPANY, THE SCRANTON ELECTRIC COMPANY, THE WASHINGTON WATER POWER COMPANY, CENTRAL ARIZONA LIGHT AND POWER COMPANY, INDIANA & MICHIGAN ELECTRIC COMPANY, IDAHO POWER COMPANY, THE MONTANA POWER COMPANY, SPOKANE UNITED RAILWAYS, SPOKANE CENTRAL HEATING COMPANY and MONTANA POWER GAS COMPANY,

6500

Defendants-Appellants,

—*against*—

SECURITIES AND EXCHANGE COMMISSION,

6501

Plaintiff-Appellee,

—and—

HOMER S. CUMMINGS, individually and as Attorney General of the United States, JAMES A. FARLEY, individually and as Postmaster General of the United States, and JAMES M. LANDIS, ROBERT E. HEALY, GEORGE C. MATHEWS, JAMES D. ROSS and WILLIAM O. DOUGLAS, individually and as constituting the Securities and Exchange Commission,

Cross-Defendants-Appellees.

Statement Under Rule 13

This appeal is from a decree of Hon. Julian W. Mack, a Circuit Judge of the United States sitting

as a District Judge for the Southern District of
6502 New York, dated March 6, 1937 and filed March 8, 1937, permanently enjoining each of the following appellants, to wit, Electric Bond and Share Company, American Gas and Electric Company, American Power & Light Company, National Power & Light Company, Electric Power & Light Corporation, United Gas Corporation, Power Securities Corporation, Lehigh Power Securities Corporation, Utah Power & Light Company, United Gas Public Service Company, Houston Gulf Gas Company, Nebraska Power Company and Pacific
6503 Power & Light Company and their servants, agents and attorneys, from violating any of the provisions of Section 4(a) of the Public Utility Holding Company Act of 1935 until each such appellant shall cease to be a holding company as defined in Section 2(a) (7) of said Act or shall register with the Securities and Exchange Commission as provided in Section 5(a) of said Act; and dismissing the counterclaim and cross-bill of complaint filed in this cause by each and every appellant against the plaintiff Securities and Exchange Commission and against the cross-defendants Homer S. Cummings,
6504 Attorney General of the United States, James A. Farley, Postmaster General of the United States, James M. Landis, Robert E. Healy, George C. Mathews, James D. Ross and William O. Douglas, members of the Securities and Exchange Commission, for want of equity and for lack of any actual controversy within the meaning of the Federal Declaratory Judgment Act of 1934. Said decree provides that the injunction shall be stayed pend-

ing an appeal to this Court or to the Supreme Court of the United States. 6505

This suit was commenced by the Securities and Exchange Commission as plaintiff, by service of a copy of the summons and complaint on Electric Bond and Share Company, American Gas and Electric Company, American Power & Light Company and National Power & Light Company on November 26, 1935, and on Electric Power & Light Corporation and United Gas Corporation on November 29, 1935, the seven parties just named being the original parties to the suit. On December 6, 1935, an order was duly made and entered upon 6506
the petition of Power Securities Corporation, Idaho Power Company, Utah Power & Light Company, United Gas Public Service Company, Houston Gulf Gas Company, The Montana Power Company, Nebraska Power Company, Pacific Power & Light Company, Lehigh Power Securities Corporation, Appalachian Electric Power Company, The Ohio Power Company, The Scranton Electric Company, Atlantic City Electric Company, The Washington Water Power Company, Pennsylvania Power & Light Company and Easton Consolidated Electric Company, permitting said companies to intervene 6507
as defendants. On January 22, 1936, an order was duly made and entered upon a bill of intervention and a stipulation permitting Central Arizona Light and Power Company, Indiana & Michigan Electric Company, Spokane United Railways, Spokane Central Heating Company and Montana Power Gas Company to intervene as intervening defendants, and permitting Homer S. Cummings, individually

and as Attorney General of the United States,
6508 James A. Farley, individually and as Postmaster General of the United States, James M. Landis, Robert E. Healy, George C. Mathews and James D. Ross, individually and as members of the Securities and Exchange Commission, to be brought in and made parties as cross-defendants to the counterclaim and cross-bill of the defendants. By the stipulation of facts filed June 30, 1936, it was stipulated and agreed that William O. Douglas, who had become a member of the Securities and Exchange Commission since the commencement of
6509 the suit, should be brought in and made a party as cross-defendant to the counterclaim and cross-bill of the defendants.

The original complaint was filed on November 26, 1935. On December 21, 1935, the plaintiff served and filed an amended and supplemental bill of complaint pursuant to an order duly made and entered on December 21, 1935, permitting it to do so. On January 29, 1936, the defendants and intervening defendants served and filed an answer to the amended and supplemental bill of complaint in which was included the counterclaim and cross-
6510 bill of complaint. On the same date, the intervening defendants, Central Arizona Light and Power Company, Indiana & Michigan Electric Company, Montana Power Gas Company, Spokane Central Heating Company and Spokane United Railways served and filed their bill of intervention which adopted the answer and counterclaim and cross-bill of complaint, and asked for further relief. On March 14, 1936, the plaintiff and cross-defendants served and filed a reply to said counterclaim and cross-bill.

Statement Under Rule 13

On June 30, 1936, the parties to the suit filed with the Court a stipulation of facts which they agreed was to have the same force and effect as though offered and received in the suit as the testimony of competent witnesses or as competent documents and pursuant to which each of the parties waived its right to offer evidence, oral or documentary, upon the trial, and agreed that this suit should be submitted upon the pleadings, said stipulation and such facts as the Court might properly judicially notice. Oral argument was had before Judge Mack on November 11 and 12, 1936. 6511

On January 29, 1937, Judge Mack rendered an opinion in this cause and on March 6, 1937, Judge Mack signed the decree from which this appeal is taken, which decree was duly entered on March 8, 1937. 6512

On April 5, 1937, a petition of appeal from said decree and an assignment of errors were filed by appellants with the District Court and a bond on appeal was submitted to said Court, and on the same date the District Court approved the bond, signed an order allowing the appeal, and issued a citation returnable May 4, 1937. On April 6, 1937, said order allowing appeal and bond on appeal were duly filed in the District Court. 6513

Opinion

6514 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In Equity
No. E81-378

Securities and Exchange Commission,
Plaintiff,

—*against*—

Electric Bond and Share Company, et al.,
Defendants,

6515 Power Securities Corporation, et al.,
Intervening Defendants, and

Homer S. Cummings, individually and as Attorney General of the United States, et al.,
Cross-Defendants.

MACK, Circuit Judge:

This is a suit in equity brought by Securities and Exchange Commission against Electric Bond and Share Company and certain subsidiaries, based
6516 upon the Public Utility Holding Company Act of 1935.[1] It seeks to enjoin defendants from violating any provision of section 4(a) of the Act unless they register pursuant to section 5 thereof. While admitting in their answer that they come within the terms of these sections, are doing the acts thereby prohibited to an unregistered company, have not registered and do not intend voluntarily so to do,

[1] Hereinafter called the Act. 49 Stat. 838, 15 U. S. C. A. §79.

defendants attack the constitutionality of the Act and of each section thereof. By cross bill with added cross defendants, an injunction against the enforcement of the Act is sought on like grounds of its unconstitutionality; furthermore, a declaratory judgment is asked for under the Federal Declaratory Judgment Act of 1934, of the constitutionality of the Act and of each section thereof. Cross defendants move for the dismissal of the cross bill. 6517

The action was originally brought against Electric Bond and Share Company (hereinafter called Bond and Share) and five of its intermediary holding companies, American Gas and Electric Company (American Gas), American Power & Light Company (American Company), Electric Power & Light Corporation (Electric Company), National Power & Light Company (National Company) and United Gas Corporation (United Company). These are all immediate subsidiaries of Bond and Share, with the exception of United Company, 7.18% of whose stock is owned by Bond and Share; but United Company is a subsidiary of Electric Company. Subsequently leave was given to sixteen other holding companies in the Bond and Share system to intervene as defendants; seven were exempted from all duties and liabilities under the Act as holding companies, pursuant to a rule of the Commission and two have ceased to be holding companies, by reason of their acquisition of all of the properties of their subsidiaries. Thus there remain in addition to the original six, the following seven defendants, Power Securities Corporation (Power Company), a subsidiary of Electric Company, 6518 6519

6520 Lehigh Power Securities Corporation (Lehigh Company), a subsidiary of National Company, Utah Power & Light Company, a subsidiary of Electric Company, United Gas Public Service Company, a subsidiary of United Company, Houston Gulf Gas Company, a subsidiary of United Gas Public Service Company, Nebraska Power Company, a subsidiary of American Company, and Pacific Power & Light Company, a subsidiary of American Company. These last five named defendants are both operating and holding companies.

6521 The cross defendants who by stipulation were brought in, personally as well as in their official capacities, are Homer S. Cummings, Attorney General of the United States; James M. Landis, Robert E. Healy, George C. Mathews and James D. Ross, members of the Securities and Exchange Commission; and James A. Farley, Postmaster General.

The facts in the case have been stipulated; where conclusions of fact have not been agreed upon, sufficient facts have been stipulated, wherever material, for the court to draw its own conclusions.

6522 A brief statement of parts of the Act will be helpful. Sec. 1 sets out the legislative findings upon which the stated policy of the Act and the need for federal regulation of holding companies were based; it recites the uses made by them and their subsidiaries of the mails and the means and instrumentalities of interstate commerce, the abuses of holding company operations and their effect on the interests of investors and consumers.

Sec. 2 defines the terms used in the Act. Thereunder "Public-utility company" is an electric utility company or a gas utility company; "Electric utility

company", a company which owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale; "Gas utility company", a company which owns or operates facilities used for the distribution at retail of natural or manufactured gas for heat, light, or power. "Holding Company" is defined as a company which owns, controls, or holds with power to vote, 10 per cent. or more of the outstanding voting securities of a public utility company or holding company. Such a company may be declared not to be a holding company on a showing to the Commission that it does not control and is not a device for controlling a public utility company or holding company. "Subsidiary company" of a holding company is a company, 10 per cent. or more of the outstanding voting securities of which are owned, controlled or held with power to vote by that holding company or by a company which is a subsidiary of that holding company. "Holding company system" is defined as a holding company together with all of its subsidiaries. Various exceptions and qualifications not here material are made relating to these and other definitions. 6523 6524

Sec. 3 specifies classes of holding companies which, with their subsidiaries, the Commission is directed to exempt from the provisions of the Act "unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers". Among these are holding companies with their subsidiaries, which are predominantly intrastate in character and confined to the one state in which all are organized. 6525

Opinion

6526 Sec. 4(a)[2] prohibits holding companies, unless registered under sec. 5 from making specified uses of the mails and instrumentalities of interstate commerce and from owning, controlling or holding with power to vote, any security of any subsidiary that does any of the specified forbidden acts. Plaintiff does not rely on sec. 4(b) that requires the holding company which has publicly distributed by means of the mail or the channels of interstate commerce an issue of securities subsequent to January 1, 1925, to register under sec. 5 if such securities are still outstanding among investors in the several states.

6527 Sec. 5(a)[3] provides for registration by holding companies by a form of notification to the Commis-

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[2] The provisions of sec. 4(a) are more fully stated in a later part of the opinion.

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[3] "Sec. 5(a) On or at any time after October 1, 1935, any holding company * * * may register by filing with the Commission a notification of registration, in such form as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers. * * *

(b) It shall be the duty of every registered holding company to file with the Commission, within such reasonable time after registration as the Commission shall fix * * * a registration
6528 statement * * * 'which' shall include—

(1) * * * copies of the charter * * * partnership, or agreement, * * * and the bylaws, trust indentures, mortgages, underwriting arrangements, voting-trust agreements, and similar documents, * * * relating to the registrant or any of its associate companies * * * prescribed as necessary or appropriate in the public interest or for the protection of investors or consumers;

(2) such information * * * and copies of such documents * * * relating to, the registrant and its associate companies as the Commission may * * * prescribe as * * * appropriate in the public interest or for the protection of investors or consumers in respect of—

(A) The organization * * * financial structure * * * and the nature of their business;

sion, and sec. 5(b)[3] provides for the filing by registered companies of registration statements containing information concerning their capitalization, business, and relations with subsidiaries. 6529

(B) the * * * rights, * * * of the different classes of their securities outstanding;

(C) the terms and underwriting arrangements under which their securities, during not more than the five preceding years, have been offered to the public or otherwise disposed of and the relations of underwriters to, and their interest in, such companies;

(D) the directors and officers * * * their remuneration, their interest in the securities of, their material contracts with, and their borrowings from, any of such companies; 6530

(E) bonus and profit-sharing arrangements;

(F) material contracts, not made in the ordinary course of business, and service, sales, and construction contracts;

(G) options in respect of securities;

(H) balance sheets for not more than the five preceding fiscal years, certified, if required * * * by an independent public accountant;

(I) profit and loss statements for not more than the five preceding fiscal years, certified, if required * * * by an independent public accountant;

(3) such further information or documents regarding the registrant or its associate companies or the relations between them as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers. 6531

(c) The Commission * * * may permit a registrant to file a preliminary registration statement without complying with the provisions of subsection (b); but every registrant shall file a complete registration statement * * * within such reasonable period of time as the Commission shall fix * * * not later than one year after the date of registration.

(d) Whenever the Commission, upon application, finds that a registered holding company has ceased to be a holding company, it shall so declare by order and upon the taking effect of such order the registration of such company shall, * * * cease to be in effect. The denial of any such application by the Commission shall be by order."

6532 The other sections of the Act apply in the main only to registered companies and their subsidiaries. Secs. 6 and 7 provide for the regulation of the issuance and sale of securities of registered companies and the altering of the rights of holders of their outstanding securities. Secs. 8, 9 and 10 deal with the regulation of the acquisition by registered companies or their subsidiaries of utilities and security assets. Sec. 11 provides for the simplification of registered holding company systems by the elimination after a certain date of holding companies above the second degree, and the requirement that
6533 each holding company system limit its operation to a single integrated public utility system, with various exceptions and limitations. Secs. 12 and 13 provide for the regulation of intercompany transactions and service, sales and construction contracts. In the administration of all of these provisions the Commission plays a large part through the requirement of the issuance of rules, and the conduct of administrative hearings. The other provisions of the Act are for the most part regulations designed to facilitate the administration of the Act in general, such as the keeping of records by registered
6534 companies, penalties for violations of the Act, and various provisions for the enforcement of the Act by the Commission.

The first question for determination is whether, as plaintiff contends, the registration provisions, secs. 4(a) and 5, if inherently constitutional, may stand, regardless of the constitutionality of the other sections of the Act, including the so-called "death sentence" sec. 11, thus obviating any consideration of the constitutionality of such other sections, so far as the bill and answer are concerned.

Defendants urge that the validity of the whole Act must be determined before they may be enjoined from doing any of the acts enumerated in sec. 4(a), or practically speaking, before they may be compelled to register, for the alleged reason that the scheme of the Act is such that it forms an inseparable whole. Plaintiff contends, on the other hand, that the Act indicates a clear line of demarcation between the obligations imposed upon an unregistered and those laid upon a registered company; that as to the former, the duty is solely to comply with secs. 4(a) and 5, that is, to register and to give certain information. Therefore, by the bill it seeks to put in issue the validity of the registration provisions alone, that is, secs. 4(a) and 5; it does not aim thereby to compel compliance with any other provision of the act, applicable only to registered companies and from which, it asserts, the registration sections are separable. 6535 6536

Furthermore, plaintiff urges that notwithstanding registration, defendants would not be deprived of the right to contest the validity of the other provisions of the Act. See *In re American States Pub. Serv. Co.*, 12 F. Supp. 667, 689 (D. Md. 1935), See *Burco Inc.* v. *Whitworth*, 81 F. (2d) 721 (C. C. A. 4th, 1936), certiorari denied, 297 U. S. 724 (1936). Any doubt as to this, is clearly dispelled by a rule of the Commission, issued pursuant to its rule-making power under the Act, which permits registration with an express reservation of any constitutional or legal rights and further provides that if such reservation shall be judicially adjudged invalid, the registration shall be voidable at the option of the registrant. *Public Utility Investing Corp* v. 6537

Utilities Power & Light Corp., 82 F. (2d) 21 (C. C.
6538 A. 4th, 1936).

The effect of the separability clause of the Act, sec. 32,[4] is to create a presumption of separability. "That is to say, we begin, in the light of the declaration, with the presumption that the legislature intended the act to be divisible, and this presumption must be overcome by considerations which make evident the inseparability of its provisions or the clear probability that the invalid part being eliminated, the legislature would not have been satisfied with what remains." *Williams* v. *Standard Oil Co.*, 278
6539 U. S. 235, 242 (1929). See also, *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 184 (1932); *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, 234 (1932). Accordingly, this presumption of the separability of the registration provisions is rebuttable in two ways: first, by a showing that standing alone, the provisions do not constitute a workable law to which legal effect can be given, and second, by evidence of a clear probability that Congress did not intend them to stand if others should be held to fall for invalidity. *Dorchy* v. *Kansas*, 264 U. S. 286 (1924); *Champlin Refin-*
6540 *ing Co.* v. *Corporation Commission, supra;* cf. *Lynch* v. *United States*, 292 U. S. 571 (1934). "Our right to destroy is bounded by the limits of necessity. Our duty is to save unless in saving we pervert. When all the world can see what sensible legislators in such a contingency would wish that we should do,

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[4] "Sec. 32. If any provision of this title or the application of such provision to any person or circumstances shall be held invalid, the remainder of the title and the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby."

we are not to close our eyes as judges to what we must perceive as men. This need is all the greater in fields where the law is in a state of transition and readjustment." *People ex rel. Alpha Portland Co.* v. *Knapp,* 230 N. Y. 48, 62-63, 129 N. E. 202, 206 (1920), per Cardozo, *J.* 6541

It seems clear, and indeed does not appear seriously to be contested, that the registration provisions in and of themselves could constitute a workable regulatory device through the publicity that may be given to the extensive information which registered holding companies must file pursuant to sec. 5, especially when supplemented by the periodical reports, pursuant to secs. 13(g) and 14. See *30 Ill. Law Rev. 648, 657* (Jan., 1936). The mere statement of some of the evil practices engaged in by some public utility holding companies, as found by the Federal Trade Commission in its investigation[5], upon which, in part, the Act is recited to be based, suffices to demonstrate that publicity of that financial information which is now seldom made public, will tend to mitigate and perhaps to eliminate at least some of those abuses. Students of public utility holding company regulation have recognized that enforced publicity would materially aid as a corrective measure in eliminating abuses. See *Bonbright, The Evils of the Holding Company,* in The Annals (Jan. 1932) 1, 3; *Mosher, Electrical Utilities* (1929) 102, 124. 6542 6543

Some of the evils recited in the Federal Trade Commission Report are:

[5] Summary Report of the Federal Trade Commission (Sen. Doc. 92, pt. 73- , 70th Cong., 1st Sess. (1935) 62:

"Loading the fixed capital account of public
6544 utilities with arbitrary or imaginary amounts in order to establish a base for excessive rates.

Writing up the fixed assets without regard to the cost thereof, with the result of watering the stock or creating a fictitious surplus.

Engaging in transactions of purchase and sale of property or securities with controlled or subsidiary companies for the purpose of recording arbitrary profits or fixing valuations unjustified by market values.

Exaction of payments from affiliated or con-
6545 trolled companies for services in excess of cost or value of such services.

Misstatement of earned surplus, or failure to distinguish earned from capital surplus, and making payment of dividends from the latter.

Deceptive or illusory methods of dividing, or pretending to divide earnings or profits.

Issuing special voting or management stock giving control at small cost in order to promote the interests of selfish cliques, against the interest and safety of the general stockholders.

Intercompany financing on a basis disadvanta-
6546 geous to operating company borrowers or lenders."

The information required to be filed in the registration statement will also be of value to investors whose interests are specifically recognized in sec. 22(a)[6] in appraising the value of securities of holding companies and their associated companies. An

[6] "Sec. 22(a) When in the judgment of the Commission the disclosure of such information would be in the public interest or the interest of investors or consumers, the information contained in any statement, application, declaration, report, or other document filed with the Commission shall be available to the public."

appreciable service will also be rendered to state regulatory commissions and to consumers in thus making available to them this information. 6547

Secs. 4(a) and 5 do not form "a confused detail of incoherent provisions." (*Water Power Cases*, 148 Wis. 124, 152, 134 N. W. 330 (1912)). They can well be given legal effect as a separate, workable Act, even though the registration provisions also give to the registered holding company a status which subjects it to such of the other statutory provisions as may be valid. The effectiveness of the publicity provisions as a regulatory device is not thereby altered.

Defendants urge that *Smith* v. *Cahoon*, 283 U. S. 553 (1931), compels a different conclusion. The defendant, a private carrier for hire, was proceeded against criminally for failure to obtain a certificate of public convenience and necessity and to pay a tax, pursuant to statute. The statute applied broadly to all "auto transportation companies" without distinguishing between private and common carriers; the Court found that many of the regulations provided for therein could be constitutionally applied only to common carriers. To the suggestion that some of the regulations could be validly enforced against defendant, the Court replied, "If * * * it could be said that the provisions of the statute should be severed, so as to afford one scheme for common carriers and another for private carriers such as the appellant, the result would be to make the statute, until such severance was determined by competent authority, void for uncertainty. Either the statute imposed upon the appellant obligations to which the State had no constitutional authority to subject him, or it failed to de- 6548 6549

6550 fine such obligations as the State had the right to impose with the fair degree of certainty which is required of criminal statutes."

Defendants' contention of a complete analogy between that certificate of public convenience and necessity and the registration provisions herein involved, cannot be sustained. The defendant in the *Cahoon* case was not entitled to a certificate as of right; the state commission could grant the certificate, "or refuse to issue the same, or may issue the same with modification, or upon such terms and conditions as in its judgment the public convenience
6551 and necessity may require." The Court found that under the terms of the statute the defendant would not be entitled to a certificate unless he complied fully with the provisions of the Act. Thus, the provisions relating to the application for a certificate, standing alone, were not legally operative.

The situation presented by the earlier case of *Weller* v. *People,* 268 U. S. 319 (1925), is really analogous. A New York statute required those engaged in the business of reselling theater tickets to procure a license at a fixed charge, and in the application therefor, to give such information as
6552 the comptroller should require to enable him to carry out the purposes of the statute. Every applicant for a license was required to file a bond guaranteeing that he would not be guilty of any fraud or extortion, and would not violate the price-fixing regulation. Any statutory violation was declared a misdemeanor. The resale of such tickets at more than fifty cents in advance of the price printed thereon was prohibited. The defense to a criminal charge of engaging in the business of reselling such tickets without having obtained a license was the

unconstitutionality of the price-fixing provision and the consequent alleged unconstitutionality of the asserted inseparable licensing requirement. 6553

The first section of the Act declared that the price or charge for admission was a matter affected with a public interest and subject to the supervision of the state to safeguard the public against exorbitant rates. The Court held that if the section restricting resale prices were eliminated, a workable plan would remain; therefore, it was deemed unnecessary to pass upon the validity of the price-fixing provision. It is to be noted that the licensing provisions were upheld notwithstanding the restricted recitals in the first section, to which, however, the Court made no specific reference. 6554

Defendants' principal contention, however, to overcome the presumption of separability, is that the entire Act revolves around sec. 11, which provides for the simplification and elimination of holding company systems, and that Congress did not intend any part of the Act to stand, in case sec. 11 should fall. They urge that the declared policy of the Act in sec. 1(c)[7] clearly shows that the ulti-

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[7] "(c) When abuses of the character above enumerated become persistent and wide-spread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title."

6556 mate objective toward which all of the other provisions of the Act are directed is that set forth in sec. 11. As the defendants construe sec. 1(c), the latter portion, declaring that to effectuate the policy of the Act, the simplification and elimination of holding companies are to be compelled, is the heart of the policy, and the other parts merely redundant. The sec. 1(c), in its entirety, negatives, however, any conclusion that this is the sole policy or the whole end and object of the Act, which, as stated, is "to meet the problems and eliminate the evils, as enumerated in this section, connected with public-
6557 utility holding companies". Simplification and elimination are but a means although not and not declared to be the exclusive means, essential "for the purpose of effectuating such policy" in whole or insofar as may be constitutionally possible. As stated by Senator Hastings, opponent of the measure, during the course of the Senate debates, "The bill itself, in Sec. 1(c), makes clear that the elimination of holding companies is not one of the objects of the bill, but is merely a means of effectuating the policy of meeting the problems and eliminating the evils connected with some public utility holding
6558 companies." 79 Cong. Rec. 8682. The House Committee, in its analysis of the bill, section by section, reported that "Subsec. (c) declares the legislative policy embodied in Title I to be that of meeting the problems and eliminating the abuses connected with public-utility holding company systems." H. R. Rep. No. 1318, 74th Cong. 1st Sess. (1935) 8. In the President's message transmitting the report of the National Power Policy Committee, it was stated that provisions like those contained in sec. 11 were

essential to "realistic and farsighted" legislation. See *Hearings before the Senate Committee on Interstate Commerce* on S. 1725, 74th Cong., 1st Sess. (1935), 2. The National Power Policy Committee had recommended that "The ultimate purpose of the legislation should be the practical elimination within a reasonable time of the holding company where it serves no demonstrably useful and necessary purpose." See id., at 6. The Senate Committee Report also stressed the importance of the provisions of sec. 11 in strong terms: "As has been pointed out above, the purpose of sec. 11 is simply to provide a mechanism to create conditions under which effective Federal and State regulation will be possible. It is therefore the very heart of the title, the section most essential to the accomplishment of the purposes set forth in the President's message." Sen. Rep. 621, 74th Cong., 1st Sess. (1935), 11. See, too, statement of Senator Wheeler, in 79 Cong. Rec. 9042, 9043. 6559 6560

The view was often expressed, however, in the debates both in the House and in the Senate that the bill presented a complete system of effective regulatory provisions, and that sec. 11 was entirely unnecessary to the purposes of the legislation. See 79 Cong. Rec. 8682, 10545. See, too, Senate Hearings, 445. 6561

While the legislative history of the Act thus reveals that sec. 11 was considered a very important, doubtless the most important step, in effectuating the purposes of the supporters of the bill and as such, was the object of the liveliest discussion between them and the opponents of the proposed legislation, I can find no indication that if the latter's

6562 apparently firm belief in its invalidity had been shared by the former, the registration provisions would not have been enacted as affording some, though not the fullest, measure of relief from many of the evils set forth in sec. 1 (b). The tenor of the debates seems to indicate rather that Congress intended the remainder of the statute to stand in case sec. 11 should be held invalid. See, e.g.; 79 Cong. Rec. 14622 ff. In any event, I cannot find that defendants have overcome the separability presumption created by sec. 32.

6563 Defendants assert that the purpose of the regulatory provisions applicable to registered holding companies, is but to exert continual pressure on holding companies to compel voluntary simplification and elimination and thus to facilitate the process provided for in sec. 11. See Senate Hearings, 7, 65, 69. Although this is not their sole purpose, since the Act contemplates permanent regulation of many holding companies, it is of course, true that in eliminating many abuses which have grown up with the holding company, the Act will tend to discourage holding companies by making them less profitable. But even if the only purpose of

6564 the regulatory provisions were to induce the "continual progress of voluntary dissolution", it would not demonstrate their inseparability from sec. 11; induced voluntary dissolution would accomplish a desired end. And the registration provisions, with the information to be given could play their part toward this end by illuminating the manipulations which have made many holding companies unduly profitable to the insiders.

It is next contended that the registration provi-

sions are merely incidental to the regulatory provisions governing registered companies, that Congress did not intend them to be a regulatory device but merely to yield information which would be helpful in the application of the other provisions of the Act. Therefore, it is argued, Congress did not intend that the registration provisions should stand in case these other provisions should be held invalid. To support this conclusion, statements are adduced from the House and Senate Committee Reports explaining the purpose of sec. 5 to be to furnish "the mechanism by which holding companies are brought under the jurisdiction of the Commission" so that the regulatory provisions can be effectively administered. H. Rep. No. 1318, 74th Cong. 1st Sess. (1935) 11; Sen. Rep. No. 621, *supra,* at 25. But the fact that registration serves and is intended to serve the purpose of bringing holding companies under the other provisions of the Act does not preclude an intention that the publicity provisions relating to the registration statement should also serve as a regulation of and an obstacle to abuses. There is ample evidence of an appreciation that the registration provisions standing alone would serve a useful purpose and that publicity was a valuable regulatory device. A utility executive submitted to the House Committee a memorandum stating that, "Few, if any, of the alleged abuses could continue after once being exposed to public scrutiny." Hearings before House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st Sess. (1935) 1344. With the purpose of publicity in mind, it was also suggested that public utility regulation should take the form of

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6568 amendments to the Securities Act of 1933 and the Securities and Exchange Act of 1934. See id., at 1335. Commissioner Healy testified before the House Committee on the value of publicity: "* * * since the Power Commission and the Trade Commission, and this committee have been looking into the holding-company situation, a great many of them have gotten religion very suddenly * * * I think it is a very valuable commentary on the value of publicity, and that it does tend to show that disclosure under the Securities Act has a good effect. It lets the daylight in." See id., at 135. It

6569 was also appreciated that the information filed with the registration statement and required to be kept up to date, when made available to the public, would be of great value to investors and to state regulatory commissions. See House Committee Report, 19; Senate Committee Report, 38; Senate Hearings, 53, 79 Cong. Rec. 8438, 8634.

Finally, as against all of these considerations, defendants urge the controlling effect of *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936). There certain labor-regulating provisions including minimum wage regulations, were held unconstitutional;

6570 and the majority of the Court decided that they were inseparable from the price-fixing provisions of the statute on the ground that, as the statute was framed, "the interdependence of wages and prices is manifest." This was based on the purpose of Congress, as the Court said, "to regulate production by the mutual operation and interaction of fixed wages and fixed prices." On that interpretation of the legislative intent, the price fixing provision could not stand alone; therefore the question of its constitutionality did not require con-

sideration. In the instant case, no such situation is presented. Neither the efficacy nor the workability of the registration provisions as a regulatory device through publicity is affected by the other provisions of the Act; there is thus no essential interdependence between them. 6571

We come then to the question of the validity of the registration provisions, that is, of secs. 4(a) and 5. They are unconstitutional, defendants contend, because they are not a regulation of interstate commerce or of the mails. The argument is that the information required to be filed under sec. 5 has no relation to and will not constitute a regulation of the acts forbidden to unregistered holding companies by sec. 4(a). It is further contended that some of the acts forbidden by sec. 4(a) do not constitute interstate commerce. 6572

The question is as to the power of Congress to forbid public utility holding companies to do the acts enumerated in sec. 4(a) unless they first register and file the information required of registered companies by sec. 5.

Although subsidiaries which themselves are not holding companies are not forbidden to do any of the acts enumerated, holding companies of subsidiaries which commit those acts are made responsible therefor by sec. 4(a) (6). Such acts of subsidiaries are thus material in considering the validity of paragraph (6). 6573

Sec. 4(a) provides: "After December 1, 1935, unless a holding company is registered under sec. 5 of this title, it shall be unlawful for such holding company, directly or indirectly—

(1) to sell, transport, transmit, or distribute,
6574 or own or operate any utility assets for the transportation, transmission, or distribution of, natural or manufactured gas or electric energy in interstate commerce".

The non-operating holding company defendants are not violating paragraph (1), but each of them owns one or more subsidiaries which is committing acts therein forbidden to holding companies, by selling electric energy or gas across state lines. United Gas Public Service Company sells gas in interstate commerce, but its subsidiaries do not.
6575 The subsidiary of Houston Gulf Gas Company, itself a subsidiary of United Gas Public Service Company, makes no sales of gas in interstate commerce. Pacific Power & Light Company sells electric energy across state lines, but has no subsidiary which does so. Nebraska Power Company sells electric energy in interstate commerce; its subsidiary transmits electric energy across state lines, charging a fee for such transmission. Neither Utah Power & Light Company nor any of its subsidiaries makes sales of electric energy or gas in interstate commerce; it transmits electric energy across state
6576 lines over its own lines and for its own account.

There is no doubt of the power of Congress to regulate the rates of electric energy and gas sold in interstate commerce. *Missouri* v. *Kansas Nat. Gas Co.*, 265 U. S. 298 (1924); *Public Utilities Com.* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927). Although this power has been directly exercised in Title II of this Act, Congress may, as an aid to its power to regulate rates in interstate commerce, require companies engaged in such business

to furnish full information about all activities carried on by them, whether or not their other business directly affects the interstate commerce in which they engage. *Interstate Commerce Com.* v. *Goodrich Transit Co.*, 224 U. S. 194 (1912). Moreover, the publication of the information required to be filed by sec. 5, by its tendency to discourage abuses of the holding company device, will exert a substantial effect in the interest of consumers, by encouraging rate reductions. The business of transmitting electric energy or gas for other companies in interstate commerce is governed by the same considerations as the sale of electric energy or gas across state lines. The transmission of electric energy or gas across state lines by a company to its own local distributing system is interstate commerce (*Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 182 (1932)) and like transportation of persons or articles across state lines even when no sales are involved is, as such, subject to federal regulation. *Caminetti* v. *United States*, 242 U. S. 470 (1917); *United States* v. *Simpson*, 252 U. S. 465 (1920); see *H. B. Marienelli, Ltd.* v. *United Booking Offices*, 227 Fed. 165 (S. D. N. Y. 1914). Congress may therefore require such companies to furnish information regarding their business. 6577 6578 6579

Sec. 4(a) (2) forbids unregistered holding companies "(2) by use of the mails or any means or instrumentality of interstate commerce, to negotiate, enter into, or take any step in the performance of, any service, sales, or construction contract undertaking to perform services or construction work for, or sell goods to, any public-utility company or holding company."

6580 The operating subsidiaries of American Gas, all located outside of New York State, receive managerial and supervisory services from the centralized executive and technical staff of 260 persons maintained by American Gas in New York City. No other company in the Bond and Share system renders them any except financial services and advice. Some of the services rendered by American Gas to its operating subsidiaries may be grouped under the various departments of the service organization, each rendering specialized services. The accounting and auditing departments supervise and audit
6581 the accounts of every operating company, and send out auditors for this purpose to the various states in which the subsidiaries are located. These activities result in extensive communication between the subsidiaries and the service organization, and the transmission of a large number of papers and reports between them. These departments also perform the necessary clerical work connected with annual stockholders' meetings of all the companies, such as the issuance of notices and the distribution of copies of the minutes. The Stock and Dividend Department maintains stock records, distributes
6582 dividend checks, and supplies stockholders' lists to local officials. The Purchasing Department negotiates purchase contracts with manufacturers and jobbers for materials and apparatus required by the operating companies. Shipments are made by the vendor directly to the operating company. A substantial part of such supplies and apparatus so shipped are transported across state lines. The Commercial Department promotes appliance and energy sales, and supervises rate structures and

advertising. In rendering these services, large numbers of booklets, pamphlets, circular letters and memoranda are distributed to local companies, and experts employed by the department spend a substantial portion of their time on the properties of the local companies. The Appraisal and Insurance Department supervises the placing of all insurance taken out by the operating companies, and keeps a number of experts in the field a large part of the time. The Engineering Department prepares plans and designs for construction work and supervises the actual construction; it renders, too, general engineering services needed by operating companies in their maintenance and development, necessitating the sending of various reports to the operating companies. Members of several of the departments are required to visit local properties. 6583 6584

With one or two exceptions, there are no written contracts for these services between the operating companies and American Gas; the services are rendered pursuant to an informal understanding with each operating company and at cost, by allocation among the operating companies.

All of the operating subsidiaries in the Bond and Share system except American Gas subsidiaries receive managerial and supervisory services from Ebasco Services Incorporated (hereinafter called Ebasco), a subsidiary of Bond and Share. The stipulation states: 6585

> "For many years prior to November 25, 1935, Bond and Share rendered engineering, financial, accounting, and other services to the holding companies and operating companies in-

6586 cluded in the American Company System, Electric Company System and National Company System, pursuant to the terms of written contracts. * * *

"On or about November 22, 1935, and pursuant to authority from the Board of Directors of Bond and Share, the officers of Bond and Share caused Ebasco * * * to be incorporated under the laws of the State of New York for the purpose and with the intention of transferring to said corporation the service organization and service business theretofore maintained by Bond and Share for operating utility
6587 companies. * * *

"Upon the organization of Ebasco, Bond and Share assigned to it (a) all of the existing service contracts between Bond and Share and operating public utility companies * * * (b) all contracts between Bond and Share and other corporations with respect to the purchase of commodities, discount arrangements and installation and repair work for or on behalf of the operating utility companies with which Bond and Share had entered into service
6588 contracts; and (c) certain miscellaneous contracts between Bond and Share and other corporations, useful in connection with the performance of such service contracts."

The serviced operating companies are divided into five regional groups, and the services to the companies in each group are under the general supervision of a senior operating supervisor, much of whose time is spent in visiting properties of the operating companies. Each senior operating spon-

sor is assisted by an accounting sponsor, an engineering sponsor, a budget sponsor, a rate sponsor and a sales sponsor, each of whom spends a substantial part of his time visiting properties of operating companies to which he is assigned. All sponsors "keep fully and continuously informed upon the detailed activities of each of the serviced companies to which they are assigned, by means of frequent visits to the properties of such companies, active correspondence and telephonic and telegraphic communications with the officers and department heads of such companies, and through the detailed periodic reports and budgets which are prepared by the serviced companies and copies of which are transmitted to Ebasco." 6589 6590

Ebasco maintains a number of specialized departments for the purpose of rendering specialized services to the operating companies. The accounting department prepares accounting systems and procedures and periodic and special bulletins and reports on accounting problems, which are transmitted to the serviced companies through the mails. The members of the accounting department are required to visit operating properties at frequent intervals. The engineering department offers advice on designs of structures and plants, valuations, operating costs and many other engineering problems. Periodic reports are sent to the serviced companies on production costs of generating plants. Many other "reports, memoranda, and engineering letters upon technical and engineering phases of the operation of utility properties" are sent to the operating companies through the mails. The engineers spend a substantial portion of their time 6591

visiting local companies. The purchasing department negotiates purchase contracts with manufacturers of materials, supplies and equipment required by the serviced companies, and a substantial portion of the purchases are transported across state lines from the manufacturer or jobber to the serviced company. Freight rates are negotiated, and shipments classified and routed; small shipments are consolidated so as to be included in carload quantities. The budget department "prepares both general and special reports and studies with respect to the preparation and revision of budget forms and forecasts and the theories and practices of budget control and transmits them (as well as the budget forms above referred to) to the serviced operating companies through the mails." The service also includes various other reports periodically and specially made to the operating companies. The insurance department negotiates insurance policies for the serviced companies. Members of this department make frequent trips to the operating companies to ascertain their insurance needs. Periodic and special reports, too, are prepared and transmitted to the serviced companies through the mails. The statistical department transmits various reports and other materials to the serviced companies, and transmits information about the serviced companies to creditors and investors on request. The tax department engages in communication with the operating companies in assisting them with tax returns, and members of the department visit local properties for the same purpose. Reports of new matters affecting tax liabilities of serviced companies are periodically transmitted

to them through the mails. The rate department "prepares periodic and special studies and reports dealing with rate problems for general distribution among the serviced companies, and transmits them to such companies through the mails. * * * Approximately one-half of the time of the members of the rate department is spent in visiting the properties of the serviced companies." The sales department prepares sales plans for the use of serviced companies in their sales of electric energy, gas and gas and electric appliances. A large part of the time of most of the experts in this department is spent visiting the properties of serviced companies. "Samples of advertising copy, folders, pamphlets, photographs and other promotional material" are distributed to operating companies. Also, various reports are transmitted to the companies. The secretarial department assists the serviced companies "in matters concerning the forms of corporate procedure and general secretarial activities." The treasury department makes use of the mails in the course of servicing the operating properties by sending out redemption notices to bondholders. The services rendered by the corporate department include advice to the operating companies as to corporate and financial structures, listing of securities, acquisition and disposal of properties and financial programs. Ebasco's subsidiary, Phoenix Engineering Corporation (hereinafter called Phoenix), performs special engineering and construction services for the operating companies. These services include the furnishing of plans and designs for plants and other production and transmission facilities, the construction of

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such plants or facilities and the supervision of con-
6598 struction work performed by other contractors. Construction services are rendered under standard construction contracts covering specific projects. "The performance of such construction contracts requires frequent communication between the New York office of Phoenix and its field staff, and the transmission of plans, designs, instructions, information and funds from New York City to the field." Phoenix has a general construction contract with only one operating company. It now has three special construction contracts, each for a specific
6599 power station.

The fees charged by Ebasco for some of the services rendered by it are computed upon a percentage of the monthly operating revenues of the serviced companies. Fees for special engineering services and construction services are computed upon a different basis, in part upon cost.

Bond and Share has rendered financial services to American Gas and its subsidiaries as well as to the other intermediate holding companies of Bond and Share and their subsidiaries. As to the American Gas System, "The last public financing by issue
6600 of bonds, debentures, preferred stocks or other securities by American Gas or any of its subsidiaries was accomplished in the year 1928, except that sales of preferred stock of subsidiary companies (purchased by American Gas from such companies) to customers in customer-ownership campaigns in the territory in which such subsidiary companies operate have been made up to and including the year 1932." While rendering financing services to the American Gas System, Bond and Share directed the sales of securities, and prepared

and transmitted circulars and other advertising material to the offices of the issuing company. Similar financing and refinancing services were performed by Bond and Share to the other companies in its system until 1935. 6601

Discussion of the validity of sec. 4(a) (2) must begin with a consideration of the abuses at which it is aimed. Those of the holding company achieved through the service contract were specified by Congress only after examining various reports of extensive investigations carried on under Congressional supervision. Sec. 1(b) reads, "Upon the basis of facts disclosed by the reports of the Federal Trade Commission * * * and otherwise disclosed and ascertained, it is hereby declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected —(2) when subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition; when service, management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States". Sec. 1(c) further states that these abuses have become "persistent and wide-spread." See in this connection, *United Fuel Gas Co.* v. *R. R. Com.*, 278 U. S. 300 6602 6603

(1929); *Smith* v. *Illinois Bell Telephone Co.*, 282
6604 U. S. 133 (1930); *Western Distributing Co.* v. *Public Serv. Com.*, 285 U. S. 119 (1932); *Columbus Gas & Fuel Co.* v. *Public Utilities Com.*, 292 U. S. 398 (1934).

After finding that service contracts are tainted with fraud because they are entered into in the absence of arm's-length bargaining and that they are against the public interest because negotiated by restraint of free and independent competition, Congress has provided by Sec. 4(a) (2) that the mails and the instrumentalities of interstate com-
6605 merce shall be closed to unregistered holding companies in negotiations, transactions, and other uses leading up to and growing out of such contracts. There is abundant authority to sustain such regulations.

In federal regulation of the use of the mails, statutes have been upheld forbidding the use of the mails to promote lotteries or schemes to defraud. *Public Clearing House* v. *Coyne*, 194 U. S. 497 (1904); *Badders* v. *United States*, 240 U. S. 391 (1916). Not only may the use of the mails be forbidden in the carriage of the lottery ticket itself,
6606 but circulars or newspapers containing advertisements of a lottery may be kept out of the mails. *Ex parte Jackson*, 96 U. S. 727 (1877); *In re Rapier*, 143 U. S. 110 (1892); *Horner* v. *United States*, 143 U. S. 570 (1892); cf. *Grimm* v. *United States*, 156 U. S. 604 (1895). More recently, the provisions of the Securities Act of 1933 forbidding the mailing of unregistered securities have been upheld. *Jones* v. *Securities and Exchange Com.*, 79 F. (2d) 617 (C. C. A. 2d, 1935), reversed on other

grounds, *Jones* v. *Securities and Exchange Com.*, 298 U. S. 1 (1936). It was further held therein that it was not an unreasonable regulation to compel all securities to be registered before mailing, without a prior determination as to whether any particular security was fraudulent or not. Cf. *Public Clearing House* v. *Coyne, supra.* These cases fully sustain the regulation here under consideration. The use of the mails may be forbidden in the formation of service contracts between a holding company and its subsidiaries, and their use may be denied in the performance of such contracts by unregistered holding companies. 6607 6608

The power of Congress to regulate interstate commerce for present purposes is sustained by the cases which upheld statutes forbidding the use of the channels of interstate commerce for transporting lottery tickets, misbranded or adulterated food and drugs, women for immoral purposes, stolen automobiles, and intoxicating liquors. *Champion* v. *Ames,* (Lottery Case), 188 U. S. 321 (1903); *Weeks* v. *United States,* 245 U. S. 618 (1918); *Pittsburgh Melting Co.* v. *Totten,* 248 U. S. 1 (1918); *Hipolite Egg Co.* v. *United States,* 220 U. S. 45 (1911); *Caminetti* v. *United States,* 242 U. S. 470 (1917); *Brooks* v. *United States,* 267 U. S. 432 (1925); *United States* v. *Simpson,* 252 U. S. 465 (1920). In upholding the constitutionality of the Securities Exchange Act of 1934, this court said, "It cannot be doubted that Congress may close the channels of interstate commerce likewise to such transactions in corporate securities as it has reasonably found and declared to be directly detrimental to the financial health of the public generally." 6609

Securities & Exchange Com. v. *Torr,* 15 F. Supp.
6610 315, 319 (S. D. N. Y. 1936) (Patterson, J.), reversed on other grounds (C. C. A. 2d, Jan. 18, 1937); cf. *United States* v. *Ferger,* 250 U. S. 199 (1919).

Ebasco and American Gas are performing service contracts through the use of the channels of interstate commerce in several ways. Negotiating the purchase of materials and equipment to be sent across state lines is making use of the instrumentalities of interstate commerce. *Furst* v. *Brewster,* 282 U. S. 493 (1931); *Federal Trade Com.* v. *Smith,*
6611 1 F. Supp. 247 (S. D. N. Y. 1932); cf. *Federal Trade Com.* v. *Pacific States Paper Trade Ass'n.,* 273 U. S. 52 (1927); *Di Santo* v. *Pennsylvania,* 273 U. S. 34 (1927). Consolidating small shipments of goods which have begun an interstate journey, so as to include them in carload quantities, constitutes a use of the instrumentalities of interstate commerce. *National Labor Relations Board* v. *National New York Packing & Shipping Co.,* 86 F. (2d) 98 (C. C. A. 2d, 1936). The following activities likewise constitute such a use: sending out employees to visit properties of the various local companies in the
6612 course of rendering engineering and other services to the operating companies (*Bay City* v. *Frazier,* 77 F. (2d) 570 (C. C. A. 6th, 1935); cf. *Caminetti* v. *United States, supra; H. B. Marienelli, Ltd.* v. *United Booking Offices, supra*); the shipment of plans, booklets, pamphlets, papers, instructions, advertising material, and like articles across state lines and continuous communication across state lines. (*International Textbook Co.* v. *Pigg,* 217 U. S. 91 (1910); *Charles A. Ramsey Co.* v. *Associated*

Bill Posters, 260 U. S. 501 (1923); *Federal Trade Com.* v. *Civil Service Training Bureau, Inc.,* 79 F. (2d) 113 (C. C. A. 6th, 1935); *Indiana Farmer's Guide Publ. Co.* v. *Prairie Farmer Publ. Co.,* 293 U. S. 268 (1934); *National Labor Relations Board* v. *Associated Press,* 85 F. (2d) 56 (C. C. A. 2d, 1936); *Binderup* v. *Pathe Exchange, Inc.,* 263 U. S. 291 (1923). This is not to say that the entire business of Ebasco or American Gas constitutes interstate commerce and is therefore subject to unlimited federal regulation. The mere use of an instrumentality of interstate commerce does not necessarily subject the entire business of the user to federal regulation under the commerce clause. *Hart* v. *B. F. Keith Vaudeville Exchange,* 12 F. (2d) 341 (C. C. A. 2d, 1926), certiorari denied, 273 U. S. 703 (1926); *Federal Baseball Club* v. *National League,* 259 U. S. 200 (1922). What is regulated in connection with the performance of service contracts is the use of the channels of interstate commerce; this use is validly prohibited in the denial of interstate facilities to certain service contracts. 6613 6614

Conditioning the use of interstate channels on registration and filing information is a reasonable method under the federal commerce power of regulating the evils growing out of the service contract. It is not a disguised attempt to invade the powers reserved to the states. *Hammer* v. *Dagenhart,* 247 U. S. 251 (1918). 6615

Sec. 4(a) (3) prohibits unregistered holding companies "to distribute or make any public offering for sale or exchange of any security of such holding company, any subsidiary company or affiliate of such holding company, any public-utility

company, or any holding company, by use of the
6616 mails or any means or instrumentality of interstate commerce, or to sell any such security having reason to believe that such security, by use of the mails or any means or instrumentality of interstate commerce, will be distributed or made the subject of a public offering." Acts forbidden by this paragraph have not been committed by American Gas since 1932, or by Bond and Share since 1935 or by Ebasco at any time. Defendants state in their answer: "Defendants are without knowledge whether they will in the future distribute or make public offerings
6617 for sale or exchange of their own securities or the securities of their subsidiary companies or affiliates, or any thereof." This, however, is negatived by another statement in the answer: "The activities forbidden by paragraphs (3), (4) and (6) of said section 4(a) are essential to the normal and ordinary conduct of the business of each of the defendants and the use, conservation and development of its properties. It is essential and necessary that each of the defendants, to maintain the integrity of its property and investments, own, control and hold with power to vote, the securities
6618 of its subsidiary companies which do the things prohibited in paragraphs (1) to (5), inclusive, of said sec. 4(a) as and to the extent hereinbefore alleged." This constitutes a threat that paragraph (3) will be violated. The validity of this paragraph is sustained by cases upholding the Securities Act of 1933 and the Securities Exchange Act of 1934. *Securities and Exchange Com.* v. *Jones*, 12 F. Supp. 210 (S. D. N. Y. 1935), affirmed *Jones* v. *Securities and Exchange Com. supra; Securities and Exchange Com.* v. *Torr, supra.*

Sec. 4(a) (4) forbids unregistered holding companies "by use of the mails or any means or instrumentality of interstate commerce, to acquire or negotiate for the acquisition of any security or utility assets of any subsidiary or affiliate of such holding company, any public-utility company, or any holding company." 6619

Defendants have made the same assertions with similar threats of violation in regard to this paragraph as to the preceding one. The acquisition of utility securities and assets has an important effect upon, and is closely tied up with their distribution and with the formation and performance of service contracts. Such acquisition offers opportunities for the extension of servicing programs to more properties; it presents opportunities for the issuance of further securities and the formation of new companies to be serviced in the usual manner. The prohibition of the use of interstate commerce facilities and the use of the mails for acquisitions by unregistered holding companies is a reasonable method of reinforcing the regulations in paragraphs (2) and (3). 6620

Sec. 4(a) (5) forbids a holding company, unless registered, "to engage in any business in interstate commerce". It does not appear that defendants or their subsidiaries are engaging or threatening to engage in any interstate business or activities other than those covered by the other provisions of sec. 4(a); a determination of the validity of paragraph (5) is therefore unnecessary. 6621

Sec. 4(a) (6) forbids unregistered holding companies "to own, control, or hold with power to vote, any security of any subsidiary company there-

of that does any of the acts enumerated in para-
6622 graphs (1) to (5), inclusive, of this subsection." Inasmuch as paragraph (5) is not involved in this case, the question is whether Congress may validly require registration by and information from holding companies if any of their subsidiaries do any of the acts enumerated in paragraphs (1) to (4), acts which it may constitutionally forbid to be done by the holding companies themselves. Sec. 2(a) (7) defines a holding company as "any company which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more of the
6623 outstanding voting securities of a public-utility company or of a company which is a holding company". But a company holding the prescribed percentage of stock in another company may apply to the Commission for an order that it is not a holding company, and the Commission must so declare if it "finds that the applicant (i) does not, either alone or pursuant to an arrangement or understanding with one or more other persons, directly or indirectly control a public-utility or holding company either through one or more intermediary persons or by any means or device whatsoever, (ii)
6624 is not an intermediary company through which such control is exercised. * * * " Corresponding provisions are made as to subsidiary companies, in sec. 2(a) (8). Not only have defendants not applied for exemptions under these provisions, but they assert in their answer that they are not entitled to apply for exemptions. It is therefore admitted, for the purposes of the Act, that defendant holding companies control their respective subsidiaries.

Paragraph (6) is an essential part of the regulations in the registration provisions, if the other paragraphs of sec. 4(a) are to have any appreciable effect. Without it, it is only necessary for any holding company to transfer its activities to its subsidiaries in order to escape the regulations. A good example of how this might be done is provided in the organization of Ebasco, and the transfer of its service contracts and facilities by Bond and Share to this 100% owned subsidiary. As to the activities normally carried on by subsidiaries, it is entirely reasonable that a controlling holding company be made responsible for them. When there is control, as admittedly prevails here, it is the holding company which in any real sense, causes the activities to be carried on. The statute thus but recognizes and gives effect to the practical situation. In *Federal Trade Com.* v. *Smith, supra,* a public utility holding company was held to be engaged in interstate commerce and therefore subject to federal regulation because of its control of its subsidiaries. The problem of disregarding or piercing through the corporate entities is not here involved; the Act, without denying the separateness of the corporations as such, charges the holding company with responsibility for those interstate activities which, by virtue of control, it causes the subsidiary to engage in. 6625 6626 6627

A decree will be entered on the bill and answer enjoining defendants as prayed for, until they shall have registered pursuant to sec. 5.

There is no violation of the Fifth Amendment, as urged by defendants. The limitation to public utility holding companies which control subsidiaries

dealing in gas and electricity, involves no arbitrary
6628 selection or classification, even though, in the public interest, the regulations might well have been extended to cover other holding companies. The legislative body "may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed." *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157, 160 (1912). The congressional findings, based upon a mass of evidence and information as recited in the Act, disclosed that the welfare of consumers of
6629 electric energy and gas and investors in public utility companies controlled by holding companies and in holding companies required this immediate protection. These findings are not shown to be unfounded or unreasonable. *Radice* v. *New York,* 264 U. S. 292 (1924); Compare *Southern Boulevard R. R.* v. *City of New York,* 86 F. (2) 633 (C. C. A. 2d, 1936). That the regulation imposed through the authorized publicity of the information required to be furnished in the registration statement is reasonably connected with the evils sought to be
6630 remedied, is clear from the discussion of the other points in the case.

On the cross-bill and counterclaim, cross-plaintiffs ask that cross-defendants be enjoined from taking any steps to enforce the Act against them and for a declaratory judgment under sec. 274d of the Judicial Code, 28 U. S. C. §400, that every provision of the Act is unconstitutional. Insofar as relief is sought from the provisions of the Act applicable to unregistered companies, the issues have been determined on the bill and answer. The questions pre-

sented therefore concern the right of cross plaintiffs to an injunction against the enforcement of the provisions of the Act relating solely to registered companies or at least to a declaratory judgment that each of such provisions of the Act is unconstitutional. 6631

As a basis for injunctive relief, irreparable injury must be shown to be impending or threatened. *Spielman Motor Sales Co.* v. *Dodge,* 295 U. S. 89 (1935). But until the Act becomes applicable to cross-plaintiffs, they show no such injury. The provisions of the Act other than the registration requirement apply only to registered companies.

Although the decree to be entered, directing a cessation of the activities forbidden by sec. 4(a) until registration, will, if ultimately sustained, probably result in registration, some months at least will necessarily elapse before this is done. The stipulation recites that each defendant which is a holding company is violating "one or more provisions of sec. 4(a) of the Act, and, unless otherwise ordered by a final decree not thereafter reversed or vacated, intends to continue, without registering, to engage in such activities and transactions". Since the defendants intend to secure a review of these proceedings, it is clear that they will not register unless and until they are required so to do by decision of the Supreme Court. Therefore, the regulations pertaining to registered holding companies will not affect them for at least some time. 6632 6633

Cross-plaintiffs are in no danger at the hands of cross-defendants or any of them before a final decision by the Supreme Court; there has been public announcement that before such decision, no

steps would be taken because of failure to comply
6634 with the Act and that penalties will even then not be enforced or action leading thereto taken by any of cross-defendants, because of the earlier failure to comply therewith. True it is that the declared intention of the individual cross-defendants will not bind their successors in office. But the cross-bill so far as it seeks relief, is necessarily directed against the named cross-defendants and from them, there is no danger or justifiable fear thereof. This Court would not be justified in the circumstances in deciding intricate constitutional questions in what
6635 is clearly a hypothetical case. Such determinations should be based on cross-plaintiffs' post-registration activities. These may or may not amount to a violation of some one or more of the alleged unconstitutional provisions pertaining to registered companies. The situation may at such time give rise to an actual controversy between some or possibly all of the parites, necessitating in due course of judicial proceedings after the prescribed administrative steps, the decision of the constitutionality of some or perhaps all of such provisions of the Act. In the circumstances there is no merit in the conten-
6636 tion that the Court should deal with the cross-plaintiffs as if they had already registered. Cf. *Ex parte La Prade,* 289 U. S. 444 (1933). The Declaratory Judgment Act is likewise of no avail in the quest for a judicial pronouncement as to the validity of each of these provisions. The statute by its terms and necessarily, in order that it may be upheld as constitutional, is to be enforced in "cases of actual controversy". There is no such controversy in this case except as to the matters decided on bill and answer. Whether or not irreparable in-

jury or a threat thereof must be shown need not be determined; the parties must at least be directly affected by the alleged unconstitutional provisions. Such is not the condition of unregistered companies. A difference of opinion between the parties as to the constitutionality of statutory provisions which are now inapplicable, and some of which may not apply even after registration, does not constitute at this time a justiciable actual controversy within the statute. *United States* v. *West Virginia,* 295 U. S. 463 (1935); *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288 (1936); *North American Company* v. *Landis* (Sup. Ct. D. C. Jan. 6, 1936) 3 U. S. L. Week 407, order vacated on other grounds by the United States Supreme Court, Dec. 7, 1936. 6637 6638

In view of the conclusions reached on the bill and answer as well as on the cross bill and reply, it is unnecessary to determine a number of interesting questions raised in the briefs and arguments.

The motion to dismiss the counterclaim and cross-bill must be sustained.

JULIAN W. MACK,
U. S. Circuit Judge. 6639

January 29, 1937.

Findings of Fact and Conclusions of Law

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IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. E81-378

[SAME TITLE]

In the above-entitled cause heard before the un-
6641 dersigned, Circuit Judge, the Court makes the following findings of fact and reaches the following conclusions of law:

FINDINGS OF FACT

JURISDICTION

1. The bill of complaint, the amended bill of complaint, the cross-bill of complaint, and the reply in this proceeding were each duly filed in the District Court for the Southern District of New
6642 York, and the court has personal jurisdiction over the defendants, the intervening defendants, and the individual cross-defendants.

DEFINITIONS

2. When used in these findings of fact and conclusions of law, the following terms are used as defined in section 2(a) of the Public Utility Holding Company Act of 1935 (49 Stat. 803; hereinafter called the Act):

Commission
electric utility company
gas utility company
public utility company
holding company
registered holding company
subsidiary company
holding-company system
security
voting security
utility assets
service contract
construction contract

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3. When used in these findings of fact and conclusions of law, unless the context otherwise requires, the term defendants is used to designate only those thirteen defendants against whom the plaintiff seeks relief, and the term intervening defendants is used to designate only the fourteen intervenors against whom plaintiff seeks no relief, all as hereinafter more particularly set forth in findings 8 and 9.

NATURE OF THE PROCEEDING

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4. The Commission by its amended and supplemental bill of complaint (hereinafter called the bill of complaint) seeks to compel each of the thirteen defendants, unless and until it registers with the Commission pursuant to the provisions of sections 4(a) and 5 of the Act, to cease to do any act prohibited to non-registered holding companies by paragraph (1), (2), (3), (4), (5), or (6) of section 4(a).

6646 The Commission by its bill of complaint seeks no relief against the fourteen intervening defendants.

The defendants and intervening defendants by their answer seek to deny the plaintiff the relief sought in its bill of complaint and by their cross-bill of complaint seek permanent injunctions against the plaintiff and the cross-defendants to enjoin the plaintiff and the cross-defendants from taking any action to enforce the Act or any provision thereof, or any rule, regulation, or order thereunder, against any defendant or intervening defendant, or to exact any penalty from, or deny the use of the mails to,

6647 any defendant or intervening defendant by reason of any violation of the Act or any provision thereof, or any rule, regulation, or order thereunder, and further seek a declaratory judgment that the Act and each and every provision thereof is unconstitutional and void.

THE AGREED STATEMENT OF FACTS

5. A stipulation of facts has been duly agreed to by all the parties and has been duly executed and filed in this proceeding. Such stipulation includes

6648 the evidentiary facts which any party deemed relevant to the proceeding or desired to present to the Court, without the opposing parties conceding the relevancy or materiality of such facts. By agreement of all the parties no other evidence, oral or documentary, was offered upon the trial of this cause (R. 262). The evidentiary facts in such stipulation, including the exhibits incorporated therein, present no disagreements between any of the parties and are found by this Court to be accurate and true, excepting only certain disagreements in respect of

the probable cost to the defendants of registration under section 5 of the Act; the amount and justification of certain write-ups, in the valuations of certain properties, found on the books of the defendants and intervening defendants and their subsidiary and predecessor companies; the exact quantities of interstate transmission of electric energy to be accredited to certain groups of companies in the Bond and Share holding-company system; the effects of territorial diversification of public-utility companies within a holding company system; and certain conclusions to be drawn from the evidentiary facts including the issue of control *vel non*. Such differences between the parties in most instances are confined within narrow limits and are not material to the Court's findings of fact or conclusions of law. Sufficient facts have been stipulated, wherever material, for the Court to make its own conclusions of ultimate fact. 6649 6650

IDENTITY OF PARTIES AND CORPORATE RELATIONS AMONG DEFENDANTS

6. The plaintiff Securities and Exchange Commission (hereinafter referred to as the Commission) is the agency of the United States authorized under section 18 of the Act to investigate violations of the Act and to bring civil proceedings to enjoin such violations and to enforce compliance with the Act, including sections 4(a) and 5. 6651

7. The cross-defendant Homer S. Cummings is the duly appointed, qualified, and acting Attorney General of the United States. The cross-defendant James A. Farley is the duly appointed, qualified,

and acting Postmaster General of the United States.
6652 The cross-defendants James M. Landis, Robert E. Healy, George C. Mathews, James D. Ross, and William O. Douglas are the duly appointed, qualified, and acting members of the Securities and Exchange Commission.

8. Each of the thirteen defendants is a corporation organized and existing under the laws of a State of the United States. The following eight of such defendants (hereinafter sometimes called the holding defendants) are holding companies but are not themselves public-utility companies (R. 264-
6653 265), and are herein referred to by the designations appearing after their respective names:

Electric Bond and Share Company (Bond and Share)
American Gas and Electric Company (American Gas)
American Power & Light Company (American Company)
National Power & Light Company (National Company)
6654 Electric Power & Light Corporation (Electric Company)
United Gas Corporation (United Company)
Power Securities Company (Power Company)
Lehigh Power Securities Corporation (Lehigh Company)

The remaining five defendants (hereinafter sometimes called holding-operating defendants) are holding companies and are also public-utility companies (R. 265-266):

Utah Power & Light Company
Nebraska Power Company 6655
Pacific Power & Light Company
United Gas Public Service Company
Houston Gulf Gas Company

9. Each of the fourteen intervening defendants is a corporation organized and existing under the laws of a State of the United States. Of the intervening defendants, the following seven are holding companies (R. 265-266) which are included within certain classes of holding companies exempted from any obligation, duty, or liability, as holding companies under any provision of the Act, including 6656 sections 4(a) and 5, by Rule 3A-2 of the Commission adopted pursuant to section 3(a) of the Act (R. 269-270; 640). Such Rule has been throughout this proceeding, and now is, in full force and effect:

Appalachian Electric Power Company
Atlantic City Electric Company
Easton Consolidated Electric Company
The Ohio Power Company
Pennsylvania Power & Light Company
The Scranton Electric Company
The Washington Water Power Company 6657

The following four intervening defendants are public-utility companies (R. 266):

Central Arizona Light and Power Company
Indiana & Michigan Electric Company
Idaho Power Company
The Montana Power Company

6658 The following three intervening defendants are non-utility companies (R. 266-267):

Spokane United Railways, which operates a street railway and bus system in the City of Spokane (R. 266).

Spokane Central Heating Company, which operates a central steam heating system in the City of Spokane (R. 267)

Montana Power Gas Company, which is engaged solely in the production and transmission of natural gas in Montana and has no facilities for the distribution thereof (R. 267)

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10. Bond and Share is the top holding company in a holding-company system (R. 2085) in which all the other defendants and intervening defendants together with numerous other public-utility companies, holding companies, and non-utility companies are subsidiary companies. Each of the defendants, other than Bond and Share, is an intermediate holding company in the Bond and Share holding-company system. Bond and Share directly owns and holds with power to vote the outstanding voting securities of five of the holding defendants in approximately, but not less than, the following percentages (R. 284, 2085):

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American Gas	—17 per cent
American Company	—20 per cent
National Company	—46 per cent
Electric Company	—47 per cent
United Company	— 7 per cent

Bond and Share also directly owns securities in the form of bonds of certain of its subsidiary public-utility companies (R. 849). 6661

Bond and Share also directly owns and holds with power to vote approximately, but not less than, 44 per cent of the outstanding voting securities of American & Foreign Power Company Inc., a holding company, which in turn directly owns and holds with power to vote outstanding voting securities of its subsidiary public-utility and holding companies, which directly or through subsidiary companies operate utility assets located entirely outside of the United States (R. 285, 2085). American & Foreign Power Company Inc., pursuant to section 3(a)(5) and 3(b) of the Act, has made application to the Commission for exemption of itself both as a holding company and as a subsidiary of Bond and Share, and for exemption of its subsidiary companies, from the provisions of the Act (R. 285). 6662

11. American Gas, American Company, National Company, and Electric Company are intermediate holding companies standing at the head of four large sub-holding-company systems which together comprise the Bond and Share holding-company system within the United States. 6663 United Company is an intermediate holding company standing at the head of a sub-holding-company system within the Electric Company holding-company system; and the remaining holding defendants and the holding-operating defendants are holding companies of holding-company systems within the American Company, National Company, Electric Company, and United Company holding-company systems. Each

6664 of the holding defendants and holding operating defendants, directly and through their respective subsidiary holding companies, own and hold with power to vote substantially more than 10 per cent of the outstanding voting securities of their respective subsidiary public-utility and holding companies; all as specifically set forth in Article V of the Stipulation of Facts (R. 283-300).

12. The defendants, Bond and Share, American Company, American Gas, Electric Company, National Company, United Company and Lehigh Company have one or more subsidiary companies which
6665 are neither holding companies nor public utility companies and which conduct various local businesses as is more particularly set forth in the stipulation of facts (R. 760-762; 770-781; 792-809; 827-837).

SEPARABILITY, VALIDITY, AND EFFECT OF SECTIONS 4(a) AND 5 OF THE ACT

13. Sections 4(a) and 5 of the Act are separate and separable from the other provisions of the Act, and the provisions within sections 4(a) and 5 of the
6666 Act are separate and separable among themselves.

14. The Congress intended sections 4(a) and 5 to be separate and separable from the other provisions of the Act, as is evidenced by section 32 of the Act; the statement, in section 1 of the Act, of the purposes and policy of the Act; the form and draftsmanship of each of the provisions of the Act; the legislative history of the Act; and the purposes served and ends accomplished by the several provisions of the Act.

15. The defendants have not offered evidence sufficient to overcome the presumption of separability created by section 32 of the Act. 6667

16. The statement of the policy of the Act in section 1(c) negatives any conclusion that simplification or elimination of holding companies is the sole policy or whole end or object of the Act; such matters are but one of the means adopted by the Congress of effectuating the end and object of the Act. The end and object of the Act is, and is stated to be, to meet the problems and eliminate the evils, set forth in section 1, connected with public-utility holding companies. 6668

17. There is nothing in the Act or in the legislative history of the Act to indicate that the Congress, if it had thought that any or all provisions of the Act other than sections 4(a) and 5 were invalid, would not have enacted sections 4(a) and 5 alone as affording some, if not the fullest, measure of relief from the evils and abuses set forth in section 1.

18. The separability of sections 4(a) and 5 of the Act as a regulatory device in their own right is not altered by their relation to the other provisions of the Act; and neither the efficacy nor workability of sections 4(a) and 5 as a regulatory device is affected by the other provisions of the Act; and there is no essential interdependence between them. 6669

19. Sections 4(a) and 5 of the Act in and of themselves serve a useful and practicable purpose of regulation by publicity; and standing alone such sections constitute a workable law to which legal

6670 effect can be given. Such regulation by publicity is reasonably related to the evils and abuses sought to be corrected by the Act and will tend to mitigate, and perhaps to eliminate, at least some of such abuses and evil practices engaged in by public-utility holding companies as found by the Federal Trade Commission, the Congress, and others.

20. The Federal Trade Commission and the Congress found that each of the following abuses and evils, among others, existed in public-utility holding-company systems:

6671 Loading the fixed capital account of public utilities with arbitrary or imaginary amounts in order to establish a base for excessive rates.

Writing up the fixed assets without regard to the cost thereof, with the result of watering the stock or creating a fictitious surplus.

Engaging in transactions of purchase and sale of property or securities with controlled or subsidiary companies for the purpose of recording arbitrary profits or fixing valuations unjustified by market values.

6672 Exaction of payments from affiliated or controlled companies for services in excess of cost or value of such services.

Misstatement of earned surplus, or failure to distinguish earned from capital surplus, and making payment of dividends from the latter.

Deceptive or illusory methods of dividing, or pretending to divide earnings or profits.

Issuing special voting or management stock giving control at small cost in order to promote

the interests of selfish cliques, against the interest and safety of the general stockholders. 6673

Intercompany financing on a basis disadvantageous to operating company borrowers or lenders.

Enforced publicity as required by section 5 of the Act will materially aid as a corrective measure in eliminating such abuses and others.

21. The information required by section 5 to be filed by holding companies upon registration will be of value to investors and further will be of appreciable service to state regulatory commissions 6674 and to consumers. The interests of investors, consumers, and state regulatory commissions are specifically recognized by the Act, and the Commission is empowered to make such information available in their interest and in the interest of the public.

22. By complying with the provisions of sections 4(a) and 5 of the Act, no defendant and no subsidiary company of any defendant will be caused any cost other than the cost of preparing and filing notifications of registration and registration statements under section 5 of the Act. The cost of registration is not excessive or unreasonable. 6675

23. The information required under section 5 of the Act is reasonably connected with the evils sought to be remedied by the Act.

24. Conditioning the use of the mails and the channels of interstate commerce by holding companies upon their registration and filing of informa-

6676 tion (i.e., upon their compliance with sections 4(a) and 5 of the Act) is a reasonable method of controlling the holding-company evils and abuses at which the Act is directed, including the evils and abuses growing out of the unregulated businesses, activities, and transactions carried on in interstate commerce and through the mails by holding companies and their subsidiary companies and specifically set forth in section 4(a) of the Act: to wit, interstate commerce in gas and electric energy; performance of service, sales, and construction contracts in interstate commerce and the mails; distri-
6677 bution and public offerings of securities in interstate commerce and the mails; and the acquisition of securities and utility assets in interstate commerce and the mails.

25. Each of the defendants controls its respective subsidiary companies within the meaning of the Act, though such defendants and their respective subsidiary companies are maintained as separate corporate entities. Their intercorporate relationships are more particularly set forth in Articles V, X, XI, XII, XIII, XIV, XV, XVI, XVII, and the
6678 Exhibits therein referred to (R. 283-301, 325-467).

(a) No defendant has made application to the Commission for an order under section 2(a)(7) of the Act declaring that it is not a holding company within the meaning of the Act. Each defendant alleges that it is not entitled to any such order (R. 155-156; 268-269), and the Commission has issued no such order as to any defendant (R. 269). The record is without evidence which would sustain a finding

that any one of the defendants is not a holding company or does not control a public-utility or holding company, or which would justify any other finding in respect of any one of the defendants such as section 2(a)(7) of the Act requires as the basis for an order or rule or regulation of the Commission declaring a company not to be holding company within the meaning of the Act. 6679

(b) No defendant has made application to the Commission for an order under section 2(a)(8) of the Act declaring that it is not a subsidiary company of a holding company within the meaning of the Act. Each defendant, other than Bond and Share, the top holding company, alleges that it is not entitled to any such order (R. 156), and the Commission has issued no such order as to any defendant (R. 269). The record is without evidence which would sustain a finding that any one of the defendants, other than Bond and Share, is not a subsidiary company of a holding company or is not controlled by a holding company, or which would justify any other finding in respect of any one of the defendants such as section 2(a)(8) of the Act requires as the basis for an order or rule or regulation of the Commission declaring a company not to be a subsidiary company of a holding company within the meaning of the Act. 6680 6681

(c) No subsidiary public-utility or holding company within the Bond and Share holding-company system has made application to the Commission for an order under section 2(a)(8) of the Act declaring such company not to be a subsidiary company, within the meaning of the Act of one or more

of the defendants (R. 269). The defendants allege
6682 that each such subsidiary company is a subsidiary company, within the meaning of the Act, of Bond and Share and of its respective holding companies and is not entitled to an order declaring it not to be a subsidiary company under the terms of section 2(a)(8) of the Act (R. 156). The record is without evidence which would sustain a finding that any such company is not a subsidiary company of its respective holding companies or is not controlled by its respective holding companies, or which would justify any other finding in respect of any such
6683 company such as section 2(a)(8) of the Act requires as the basis for an order or rule or regulation declaring a company not to be a subsidiary company of a holding company within the meaning of the Act.

(d) This paragraph 25 shall not be construed (1) to deny to any defendant the right to apply to the Commission under section 2(a)(7) for an order declaring any such defendant not to be a holding company, or (2) to deny to any defendant, or any company in its holding-company system, the right
6684 to apply to the Commission under section 2(a)(8) for an order declaring any such defendant or other company not to be a subsidiary company of any defendant herein, or (3) to prejudge the action of the Commission upon any such application.

26. It is reasonable that holding companies (and these defendants as holding companies) controlling their respective subsidiary companies within the meaning of the Act, be made responsible for the acts of such subsidiary companies. Where there is con-

trol, within the meaning of the Act, it is the holding company that in any real sense causes the activities of its subsidiary companies to be carried on. Section 4(a)(6) of the Act is a recognition of this practical situation and a reasonable attempt, without any denial of the separateness of the corporations as such, to charge the holding companies (and these defendants as holding companies) with responsibility for the activities in interstate commerce and the mails in which they cause their subsidiary companies to engage. Furthermore, section 4(a)(6) of the Act is an essential part of the regulations in section 4(a) if such regulations are to have any effect and are not to be susceptible of ready evasion by the transfer by a holding company of all its activities to subsidiary companies. 6685 6686

27. The limitation of the application of the Act, and hence the limitation of the regulations embodied in sections 4(a) and 5, to holding companies which control electric- and gas-utility subsidiary companies involves no arbitrary selection or classification even though the Congress might have extended its regulation to all holding companies or to different or broader classifications of holding companies. And the findings of the Congress which prompted it to adopt the classification in the Act are not shown to be unfounded or unreasonable. 6687

28. The terms holding company and subsidiary company within the meaning of sections 4(a) and 5 of the Act, and the other terms used in such sections, are defined with reasonableness, definiteness, and certainty in section 2(a); and the inclusion of defendants and their subsidiary companies within

such terms as so defined is reasonable, definite, and
6688 certain.

DEFENDANTS' VIOLATIONS OF SECTIONS 4(a) AND 5

29. Each of the thirteen defendants is a holding company within the meaning of sections 4(a) and 5 of the Act and has not been exempted, or made application for exemption, under section 3(a) or any other exemptive provision of the Act, from such sections 4(a) and 5. Each defendant alleges that it is not entitled to any such exemption.

6689 30. No defendant has registered with the Commission pursuant to section 5 of the Act; and no defendant intends voluntarily so to register (R. 268). Each defendant, in the ordinary course of its business, is now engaged in businesses, activities, and transactions prohibited to non-registered holding companies by one or more of the provisions of section 4(a) of the Act; and each defendant, unless otherwise ordered by a final decree not thereafter reversed or vacated, intends to continue, without registering, so to engage in such businesses, activities and transactions (R. 270), all as hereinafter
6690 more particularly set forth in findings 31 to 60.

Interstate transmission of electric energy

31. Each subsidiary electric-utility company in the Bond and Share holding-company system is engaged in the business of generating or receiving electric energy and distributing or delivering such energy for sale in the manner and to the extent set

forth in the stipulation of facts (R. 489-609, 1964-2060, 2118-2158). Such subsidiary companies operate facilities in thirty-two States of the United States for the generation, distribution, and sale of electric energy (R. 11); they handle approximately 15 per cent of the total electric energy sold in the United States, and own approximately 23,460 miles of transmission lines or approximately 30 per cent of the total mileage of transmission lines within the United States (R. 2061). Some of such subsidiary companies transmit electric energy on their own lines and for their own account across state lines for distribution by themselves. Others either sell or purchase at wholesale across state lines substantial percentages of the electric energy which they handle. Others conduct the major portion or all of their electric-utility operations within the boundaries of a single state and sell, purchase, or transmit across state lines only a small percentage or none of the total electric energy which they handle. Such of the subsidiary electric-utility companies as so sell, purchase, or transmit electric energy across state lines, are to that extent engaged in activities and a business in interstate commerce. The facts as to the subsidiary companies of each of the defendants are more particularly stated and referred to in the following paragraphs.

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32. Of the total electric energy handled by the subsidiary electric-utility companies of Bond and Share, not less than 25 per cent is regularly sold, purchased, or transmitted across one or more state lines by some of such subsidiary companies (R. 2061, 2053). The total amount of electric energy so sold,

6694 purchased, or transmitted across state lines by these subsidiary electric-utility companies has amounted in recent years to more than 3 billion kwh annually, and this volume is presently continuing undiminished (R. 2053). The total electric operating revenue of subsidiary companies of Bond and Share amounted in 1934 to $232,865,299. Of these revenues $74,224,524 was realized by companies whose properties were situated in one state and which did not transmit, purchase or sell electric energy across state lines. $65,143,957 was realized by companies whose properties were located in one state but
6695 which transmitted, purchased or sold some electric energy across state lines. $93,496,818 was realized by companies whose properties were located in two or more states and which transmitted, purchased or sold some electric energy across state lines. The total wholesale transfers and sales of electric energy (exclusive of electric energy transmitted for their own account) at or across state lines by subsidiary companies of Bond and Share to other associate and non-associate companies amounted to $5,417,691 (R. 2037).

6696 33. Of the total electric energy handled by the subsidiary electric-utility companies of American Gas, operating in nine adjoining States with approximately 6,000 miles of transmission lines (R. 433), substantial amounts are regularly sold, purchased, or transmitted across one or more state lines by some of such subsidiary companies, as is more particularly set forth in the stipulation of facts (R. 576-610, 1964-1978, 2000-2013, 2033-2059, 2154-2158).

34. Of the total electric energy handled by the subsidiary electric-utility companies of American Company, operating in 14 States with approximately 9,750 miles of transmission lines (R. 307-308, 2089), substantial amounts are regularly sold, purchased, or transmitted across one or more state lines by some of such subsidiary companies, as is more particularly set forth in the stipulation of facts (R. 489-522, 1964-1985, 1996-1999, 2010-2021, 2036-2059, 2118-2158). 6697

35. Of the total electric energy handled by the subsidiary electric-utility companies of National Company, operating in 7 States with approximately 2,850 miles of transmission lines (R. 323-324), substantial amounts are regularly sold, purchased, or transmitted across one or more state lines by some of such subsidiary companies, as is more particularly set forth in the stipulation of facts (R. 552-576, 1964-1979, 1992-1999, 2010-2015, 2028-2031, 2037-2059, 2118-2158). 6698

36. Of the total electric energy handled by the subsidiary electric-utility companies of Electric Company, operating in 10 States with approximately 5,180 miles of transmission lines (R. 313, 2093), substantial amounts are regularly sold, purchased, or transmitted across one or more state lines by some of such subsidiary companies, as is more particularly set forth in the stipulation of facts (R. 522-552, 1964-1979, 1986-1991, 1996-1999, 2010-2015, 2022-2027, 2037-2059, 2118-2158). 6699

37. The subsidiary electric-utility company of Power Company operates in three states (R. 311)

6700 and is regularly engaged in selling, purchasing, or transmitting some electric energy across state lines (R. 525, 529-534).

38. One or more subsidiary electric-utility companies of Lehigh Company are regularly engaged in selling, purchasing, or transmitting some electric energy across state lines, as is more particularly set forth in the stipulation of facts (R. 570-576, 1995, 2091).

39. Utah Power & Light Company (R. 523-529) is itself an electric-utility company; and it operates
6701 in three states and its subsidiary electric-utility companies each operate in one state (R. 311). Utah Power & Light Company itself is regularly engaged in transmitting some electric energy across state lines for its own account (R. 523-529).

40. Nebraska Power Company is itself an electric-utility company; and it operates in one state and its subsidiary electric-utility company operates in that state and in one adjoining state (R. 305). Nebraska Power Company itself sells electric energy across state lines and its subsidiary electric-
6702 utility company is regularly engaged in selling or transmitting some electric energy across state lines (R. 511-513).

41. Pacific Power & Light Company is itself an electric-utility company; and it and its subsidiary electric-utility company operate in two states (R. 305). Pacific Power & Light Company itself transmits electric energy across state lines and its subsidiary electric-utility company is regularly engaged

in selling or transmitting some electric energy across state lines (R. 493-495). 6703

Interstate transportation of gas

42. Each subsidiary gas company in the Bond and Share system is engaged in the business of extracting or manufacturing natural or manufactured gas or transporting and distributing such gas for sale at retail or at wholesale. [The term gas company as used in these findings includes companies dealing in gas either at wholesale or retail. The term gas utility company as defined in the Act includes only retail companies, but such definition has no relation to section 4(a)(1) which covers both wholesale and retail companies.] 6704 These subsidiary gas companies operate in fifteen states of the United States and in the Republic of Mexico (R. 620). They own or control producing properties of approximately one and one-half million acres of gas leases and more than 6,000 miles of main gas line (R. 620); and they produce and sell more than 213 billion cubic feet of natural and manufactured gas annually (R. 620). Certain of these subsidiary gas companies constitute an interconnected system 6705 for the extraction and distribution of natural gas from gas fields in Texas, Louisiana, and Mississippi to consumers in Texas, Louisiana, Mississippi, Alabama, Florida, Tennessee, Missouri, Illinois, and the Republic of Mexico (R. 2160). Some of the subsidiary gas companies in the Bond and Share system transport gas across state lines, some sell or purchase gas across state lines, some purchase and thereafter sell gas which has been transported across state lines and some

6706 do not purchase or sell or transport any gas across state lines or which has crossed state lines, as is more particularly set forth in the stipulation of facts (R. 620-637, 2160-2164). The volume and percentage of natural and manufactured gas sold, purchased, or transported in interstate commerce by the gas companies within the holding company systems of such respective defendants are as hereinafter described in findings 43 to 49.

6707 43. Of the total natural and manufactured gas sold, purchased, or transported by the subsidiary gas companies of Bond and Share, approximately 46 percent is transported across one or more state lines by such subsidiary companies (R. 622). The amount of gas transported across state lines by these companies has in recent years totaled approximately 91 billion cubic feet annually (R. 622), and this volume is presently continuing undiminished.

6708 44. The subsidiary gas companies of Electric Company are regularly engaged in an extensive business in gas; and of the total gas handled by such subsidiary companies, approximately 47 percent is transported across state lines by some of such companies and others (R. 620-622, 628-629).

45. The subsidiary gas companies of United Company are regularly engaged in an extensive business in gas (R. 628-633). Of the total gas handled by such subsidiary companies, approximately 47 per cent is transported across state lines by some of such companies and others (R. 620-622, 628-629).

46. One subsidiary gas utility company of American Company is regularly engaged in transporting some manufactured gas across state lines for sale by it at retail (R. 634). Another subsidiary gas utility company of American Company regularly purchases manufactured gas for resale in one state which gas is produced in another state, and delivered to such gas utility company at the state line (R. 634-635). 6709

47. Some subsidiary gas utility companies of National Company regularly purchase natural gas for resale in one state which gas is transported to them across state lines (R. 631-632). 6710

48. United Gas Public Service Company itself transports gas across state lines and it and its subsidiary gas companies are regularly engaged in an extensive business in gas a large percentage of which is transported across state lines by some of such companies and others (R. 620-628).

49. Houston Gulf Gas Company and its subsidiary gas company are each regularly engaged in purchasing gas, some of which is transported to them across state lines, and thereafter selling the same (R. 626-628). 6711

Performance of service and construction contracts in interstate commerce and through the mails

Bond and Share

50. Ebasco Services Incorporated (hereinafter called Ebasco) regularly and continuously per-

forms service contracts whereby for a charge it performs services for, or negotiates for the sale of goods to, all or substantially all of the subsidiary public-utility companies in the Bond and Share holding-company system (herein called the serviced companies); except that Ebasco does not perform such service contracts (other than to the limited extent hereinafter described in finding 54) for the subsidiary public-utility companies of American Gas. Ebasco is a wholly owned subsidiary company of Bond and Share. The performance of service contracts by Ebasco constitutes an extensive business in rendering continuous expert, specialized, and technical service, advice, and assistance to the serviced companies upon every phase of the utility business (R. 362, 401, 2108-2111).

Phoenix Engineering Corporation (herein called Phoenix) performs construction contracts whereby for a charge it performs construction work for subsidiary public-utility companies in the Bond and Share holding-company system (R. 385-390) other than the subsidiary public-utility companies of American Gas. Phoenix is a wholly owned subsidiary company of Ebasco.

51. The service and construction contracts are performed by Ebasco or Phoenix for a charge based upon the gross revenues of the serviced companies in the case of service contracts, and for a charge based in part upon the cost of construction in the case of construction contracts (R. 391). The income received by Bond and Share directly or through Ebasco and Phoenix from performance of service and construction contracts has for many

years constituted a substantial portion of the gross revenues of Bond and Share; and the net profit to Bond and Share from such business has for many years constituted a substantial part of the income of Bond and Share (R. 390-392, 414). 6715

52. Prior to November 25, 1935, the service contracts now performed by Ebasco were regularly and continuously performed by Bond and Share, and until that date Phoenix was a wholly owned subsidiary company of Bond and Share and performed its construction contracts as such subsidiary. On or about November 25, 1935, Bond and Share formed Ebasco for the purpose and with the intent of transferring to it the servicing organization and business of Bond and Share, including the construction business of Phoenix (R. 352-355). Upon the formation of Ebasco, Bond and Share transferred to it, among other securities and properties, all existing service contracts between Bond and Share and its subsidiary public-utility companies and all other contracts of Bond and Share useful in the performance of the service and construction business; and transferred to Ebasco substantially all of its personnel which had formerly been employed by Bond and Share in such business and which is now employed and paid by Ebasco, and all the capital stock of Phoenix. 6716 6717

53. The offices of Bond and Share, Ebasco, and Phoenix are located in the State of New York, and the principal offices and the properties of all the public-utility subsidiary companies of Bond and Share are located entirely outside the State of New York (R. 361, 387). In the performance of service or construction contracts, all communica-

6718 tion between Ebasco or Phoenix and such subsidiary companies and all travel by officers and employees of Ebasco or Phoenix to or from such companies are across state lines and are of necessity undertaken by use of the mails and the instrumentalities of interstate commerce (R. 361-362). The performance of such service and construction contracts for a charge constitutes (and will unless Bond and Share is restrained continue to constitute) a continuous and extensive business carried on by use of the mails and the means and instrumentalities of interstate commerce by Ebasco and Phoenix, subsidiary companies of Bond and
6719 Share, as follows:

(a) Such business involves the regular and frequent shipment by Ebasco and Phoenix by means of the instrumentalities of interstate commerce and of the mails of large quantities of forms, reports, data, studies, documents, and other papers and of advice, recommendations, instructions, and information (R. 366-390).

(b) Such business regularly and frequently in-
6720 volves the use by Ebasco and Phoenix of the mails and the instrumentalities of interstate commerce in the sending of employees to the properties of the serviced companies in the course of rendering engineering and other services to and performance of construction contracts for such companies (R. 385-390).

(c) Such business involves the purchase or exchange of large volumes of equipment, materials, and supplies on behalf of and for the serviced com-

panies. Such purchases are made pursuant to contracts with manufacturers or jobbers which are negotiated by Ebasco as purchasing agent for the serviced companies; and a substantial majority of the equipment, material, and supplies so purchased is shipped across state lines by the vendors to the serviced companies. Such activities involve the use by Ebasco and Phoenix of the mails and the instrumentalities of interstate commerce (R. 370-373). 6721

(d) Such business involves the classifying, consolidating, and routing by Ebasco of freight shipments across state lines to the serviced companies of equipment, materials, and supplies, the negotiating of freight rates for such shipments, and the performance of other services in connection with such shipments (R. 370-373), all involving the use by Ebasco of the mails and the instrumentalities of interstate commerce. 6722

(e) Such business involves the entering into and performance by Ebasco and Phoenix of service and construction contracts for the construction, extension, or replacement of plants, lines, and other utility assets of the serviced companies, and for advice, supervision, engineering work, purchases, and other services in connection with such construction, extension, and replacement. Such contracts are performed from the offices of Ebasco and Phoenix in New York by means of regular and continuous travel and communication to the serviced companies and their properties outside of New York (R. 385-390), constituting the use by 6723

6724 Ebasco and Phoenix of the mails and the instrumentalities of interstate commerce.

(f) Such business involves causing, negotiating, and making public offerings of numerous securities of the serviced companies. In the past, such securities were, either by Bond and Share, or by an underwriter pursuant to negotiations instigated and carried out by Bond and Share, distributed from New York throughout all the States of the United States; and in so doing Bond and Share used the mails and the instrumentalities of interstate commerce (R. 415-426). Such business when continued
6725 by Ebasco pursuant to existing contracts assumed by Ebasco will necessitate the regular use by Ebasco of the mails and the instrumentalities of interstate commerce.

54. Throughout the history of American Gas, Bond and Share has for a charge rendered financial services to American Gas and the subsidiary public-utility companies of American Gas in connection with the financing and marketing of securities of American Gas and such subsidiary companies (R.
6726 435, 461-467), which business has constituted the performance of service contracts within the meaning of the Act by Bond and Share for American Gas. Such financial services have been similar to the financial services rendered by Bond and Share to other subsidiary companies, except that they usually were not rendered pursuant to formal or continuing contracts, as in the case of the other companies, but pursuant to particular arrangements for each particular service (R. 435-462). Such arrangements were carried out by Bond and

Share by the use of the mails and the instrumentalities of interstate commerce. Ebasco, since its formation, has remained equipped to perform these financial services (R. 415), although Ebasco to date has rendered no service to American Gas or the subsidiary companies of American Gas (R. 360), none of which have, since the organization of Ebasco, undertaken any financing of the kind formerly negotiated through the service departments of Bond and Share. The last public financing done by American Gas or any of its subsidiaries was accomplished in the year 1928, except that sales of preferred stock of subsidiary companies to customers in customer ownership campaigns have been made up to and including the year 1932 (R. 461). 6727 6728

American Gas

55. American Gas for many years past has performed services for its subsidiary public-utility companies pursuant to informal arrangements which constituted and continues to constitute the performance of service and construction contracts for its subsidiary public-utility companies (R. 443-467). A charge is made by American Gas for the performance of such contracts representing an allocation, among the companies serviced, including American Gas itself, of the cost of rendering the services. American Gas received substantial sums annually from its subsidiary companies in payment of the costs so allocated to them; and the volume of the servicing business and activities of American Gas is presently continuing undiminished (R. 467, 1959). 6729

6730 56. The offices of American Gas are located in the State of New York, and the principal offices and the properties of all its serviced companies are located entirely outside the State of New York (R. 443-444). In the performance of its service and construction contracts, all communications between American Gas and the serviced companies and all travel by officers and employees of American Gas to or from such companies are across state lines and are of necessity undertaken by use of the mails and the instrumentalities of interstate commerce (R. 443-444). The performance of such
6731 service and construction contracts for a charge constitutes (and will unless American Gas is restrained continue to constitute) a continuous and extensive business by American Gas carried on by use of the mails and the means and instrumentalities of interstate commerce. Such servicing business involves the regular and continuous shipment in interstate commerce and through the mails of large quantities of directions, instructions, forms, reports, data, advice, studies, documents, and other articles and information to and from the serviced companies; the continuous sending in interstate
6732 commerce of employees of American Gas to the properties of the serviced companies; the purchase, exchange, and transportation in interstate commerce and through the mails of large volumes of equipment, materials, and supplies for the serviced companies; and the performance, from the offices of American Gas in New York by means of regular and continuous travel, transportation, and communication to the serviced companies and their properties outside of New York, of service and construction contracts for the construction, extension,

and replacement of plants, lines, and other utility assets of the serviced companies, and for advice, supervision, engineering work, purchases, and other services in connection with such construction, extension, and replacement (R. 443-467). 6733

Public offerings and distribution of securities in interstate commerce and through the mails

57. Prior to November 25, 1935, Bond and Share as a part of its business has distributed or made public offerings for sale or exchange of its securities and of the securities of subsidiary companies by use of the mails and means or instrumentalities of interstate commerce, and has also sold such securities having reason to believe that such securities by use of the mails and means or instrumentalities of interstate commerce would be distributed or made the subject of a public offering, in the manner hereinafter described. Bond and Share has taken an active part in the sale to purchasing groups of securities of American Company, National Company, Electric Company and of certain securities of their subsidiary companies and occasionally has directly as a member of the purchasing groups distributed such securities, and has also taken an active part in the distribution of certain securities of subsidiary companies to customer purchasers, all in the manner described in Article XV of the stipulation of facts (R. 415-427). Bond and Share has taken an active part in the sale to purchasing groups of securities of American Gas and of certain securities of its subsidiary companies and has also taken an active part in the distribution of cer- 6734 6735

6736 tain securities of subsidiary companies to customer purchasers, in the manner described in section 116 of the stipulation of facts (R. 461-467). In active years such distribution of securities by Bond and Share has annually involved securities of a face or par value of approximately 100 million dollars (R. 1854-1893). Since its formation, Ebasco has at all times remained, and is now, equipped similarly to handle the securities of the subsidiary public-utility and holding companies in the Bond and Share holding-company system in the manner heretofore done by Bond and Share; and is committed
6737 under service contracts so to handle the securities of all the subsidiary public-utility companies of Bond and Share, except the subsidiary companies of American Gas. Bond and Share will continue unless restrained to cause Ebasco to engage in such security transactions by means of the instrumentalities of interstate commerce and through the mails as the business of Bond and Share and its subsidiary companies requires (R. 159, 270, 415).

58. Heretofore American Gas, in part with the assistance of Bond and Share and in part through
6738 its own service organization, as a part of its business has distributed or made public offerings for sale or exchange of its securities and the securities of subsidiary companies by use of the mails and the instrumentalities of interstate commerce, and has also sold such securities having reason to believe that such securities by use of the mails and instrumentalities of interstate commerce would be distributed or made the subject of a public offering, as is more specifically described in section 116 of the stipulation of facts. American Gas has taken

an active part in the sale to purchasing groups of its securities and the securities of its subsidiary companies, and has also taken an active part in the distribution of certain securities of subsidiary companies to customer purchasers. American Gas will continue unless restrained so to engage in such securities transactions by use of the mails and the instrumentalities of interstate commerce as its business needs and those of its subsidiary companies require. 6739

59. Under the supervision of Bond and Share, each remaining defendant has, by use of the mails and the instrumentalities of interstate commerce caused, negotiated, and made public offerings and distributions of its securities and has caused to be similarly offered and distributed the securities of its subsidiary public-utility and holding companies. Each such defendant will continue unless restrained so to distribute and make public offerings of such securities as its business needs and those of its subsidiary companies require (R. 159). 6740

60. The past activities, as hereinbefore described, of each of the defendants regarding the distribution and public offering of securities by means of the instrumentalities of interstate commerce and the mails, and the allegations by the defendants in respect thereof, constitute threats by each defendant to violate section 4(a)(3) of the Act. 6741

Acquisition of securities and utility assets by use of the mails and instrumentalities of interstate commerce

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61. Bond and Share, American Gas, American Company, Electric Company, National Company, United Company, and United Gas Public Service Company in the regular and normal conduct of their business have, by use of the mails and the instrumentalities of interstate commerce, from time to time acquired and negotiated for the acquisition of securities or utility assets of their subsidiary companies or of public utility or holding companies.

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Each defendant or one or more of the subsidiary companies of each defendant have, by use of the mails and the instrumentalities of interstate commerce, acquired and negotiated for the acquisition of such securities or utility assets. Each defendant or one or more of its subsidiary companies will continue, unless restrained, so to acquire and negotiate for the acquisition of such securities or utility assets (R. 270).

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62. Such activities by each of the defendants regarding the acquisition of securities and utility assets by use of the mails and the instrumentalities of interstate commerce, and the allegations of the defendants in respect thereof, constitute threats by each defendant to violate section 4(a)(4) of the Act.

DISMISSAL OF THE CROSS-BILL

63. In so far as defendants and intervening defendants in their cross-bill ask relief from the provisions of sections 4(a) and 5 of the Act, the issues

are raised and joined by the bill of complaint and the answer thereto and may be determined upon such pleadings and the stipulation of facts without resort to the cross-bill. 6745

64. Other than sections 4(a) and 5(a), the provisions of the Act (with minor exceptions not material to this cause) apply only to registered holding companies and their subsidiary companies. Each defendant is a non-registered holding company, and as such, no provision of the Act, other than the provisions of sections 4 and 5(a) of the Act, is applicable, can be applied, or has been threatened by the plaintiff or any cross-defendant or any other officer or agency of the United States, to be applied, to any of them. 6746

65. The filing by the plaintiff of its bill of complaint in this proceeding and its prosecution of this proceeding constitute the sole act, conduct, or threat by the plaintiff or any cross-defendant or any other officer or agency of the United States to enforce the Act or any part thereof or any rule, regulation, or order thereunder against the defendants or any of them or against any subsidiary company or affiliate of any defendant, or any director, officer, employee, or agent of any defendant. Such act, conduct, and threat are solely in respect of the civil enforcement of the provisions of sections 4(a) and 5 of the Act and of the rules and regulations thereunder against the thirteen defendants; and they do not constitute any act, conduct, or threat to enforce, or to exact or inflict any penalty for the violation of, any other provision of the Act or any rule, regulation, or order thereunder. 6747

The defendants are in no danger at the hands of the
6748 plaintiff or the cross-defendants, or any of them, before a final decision by the Supreme Court—the plaintiff and each of the cross-defendants having made public announcement (prior to and at about the time of the commencement of this proceeding) and having stipulated therein that no steps would be taken, until a final decision by the Supreme Court, because of failure to comply with the Act, and that even after such decision no penalties would be sought for earlier offenses; all as specifically set forth in the stipulation of facts (R. 641-
6749 651). The Court takes judicial notice of the fact that the plaintiff Commission has made a number of rules, regulations and orders applicable to registered holding companies and their subsidiaries including regulations regarding a system of accounts and regulations regarding service, sales, and construction contracts. But neither the plaintiff Commission nor the cross-defendants have taken or threatened any civil or criminal proceedings against any registered holding company or any subsidiary company thereof for failure to comply with the provisions of the Act, or any rule, regulation, or
6750 order thereunder applicable to registered holding companies or subsidiary companies thereof.

66. The defendants have offered no evidence to support a finding, and the record is without any facts which could support a finding, that any defendant or any subsidiary company of any of them has suffered or is suffering any irreparable or substantial damage, impending or threatened, by reason of any act, conduct, or threat of the plaintiff or any cross-defendant or any other officer or agency of the

United States, or by reason of the existence of the Act or any provision thereof or any rule, regulation, 6751
or order thereunder. Until the provisions of the Act other than sections 4(a) and 5 become applicable to the defendants, neither they nor their subsidiary companies show any irreparable or substantial injury, impending or threatened. If the defendants register under the Act and if they do not cease to be holding companies as defined in the Act, the defendants will become registered holding companies and their subsidiary companies will become subsidiary companies of registered holding companies, and the provisions of the Act and the 6752
rules, regulations, and orders of the Commission thereunder relating to registered holding companies or subsidiary companies of registered holding companies will in accordance with their terms (subject to such exemptions as are provided in the Act or by the rules, regulations and orders of the Commission thereunder) become applicable to the defendants as registered holding companies and to their subsidiary companies as subsidiary companies of registered holding companies.

67. The defendants have offered no evidence, and 6753
the record is without any evidence to support a finding that any provision of the Act applicable solely to registered holding companies or any rule, regulation, or order thereunder presently applies to any of the defendants. This Court cannot presently determine in what manner and to what extent and in what circumstances, if ever, any such provision of the Act or rule, regulation, or order thereunder will become applicable to any such defendant. This Court would not be justified in the cir-

6754 cumstances in deciding intricate constitutional questions in what is clearly a hypothetical case. Such determinations should be based on post-registration activities of the defendants. This Court is not able on this record to determine whether such activities of the defendants will or will not amount to a violation of some one or more of the provisions pertaining to registered companies.

68. The intervening defendants who have appeared herein pursuant to order of this Court entered upon stipulation of the parties by bill of intervention in the nature of both answer and counter-
6755 claim or cross-bill, are without right or standing as subsidiary companies of non-registered holding companies to defeat the plaintiff's right to relief as prayed for against the defendants, and are without right or standing in this proceeding to an adjudication as to what their rights, liabilities and duties as subsidiaries of registered holding companies ought to be if hereafter the defendants or any of them become registered holding companies.

CONCLUSIONS OF LAW

6756 THE BILL OF COMPLAINT AND ANSWER THERETO

Scope of the issues

1. The plaintiff's bill of complaint and defendants' and intervening defendants' answer thereto present no justiciable case or controversy over which this Court has jurisdiction, excepting only a justiciable controversy between the plaintiff and

each defendant regarding the validity and effect of sections 4(a) and 5 of the Act as applicable to each defendant and the obligations, duties, and liabilities of each defendant thereunder. 6757

2. Compliance by any defendant with sections 4(a) and 5 of the Act will not waive or impair any constitutional, legal, or other right of such defendant under any other provision of the Act.

3. The provisions of sections 4(a) and 5 of the Act are separable from the other provisions of the Act; and the several provisions of sections 4(a) and 5 of the Act are separable from each other. 6758

4. The application, operation, and enforcement of sections 4(a) and 5 of the Act are not dependent upon the application, operation, or enforcement of any other provision of the Act. Sections 4(a) and 5 of the Act serve a useful purpose in and of themselves and constitute a workable regulatory device to which legal effect can be given.

The validity of sections 4(a) and 5

5. Sections 4(a) and 5 of the Act, as applicable to each of the thirteen defendants against whom the plaintiff in its amended and supplemental bill of complaint seeks relief (hereinafter called the defendants) and as applicable to the acts and transactions of each of such defendants, are valid and constitutional. 6759

6. Sections 4(a) and 5 of the Act, as applicable to each of the defendants and to the acts and trans-

6760 actions of each of the defendants, are a fair and reasonable and valid regulation of commerce among the several States and a fair and reasonable and valid regulation of the mails, and involve no improper delegation of legislative power and do not violate any provision of the Fifth Amendment or Tenth Amendment or any other provision of the Constitution of the United States.

7. The terms holding company and subsidiary company as used in sections 4(a) and 5 of the Act are defined with definiteness and certainty in section 2(a) of the Act and are reasonable, proper, and valid; and the remaining terms used in sections 4(a) and 5 of the Act, as defined in section 2(a) of the Act, are definite, certain, reasonable, proper, and valid.

6761

8. Since December 1, 1935, it has been and is now unlawful for a holding company, which is not registered with the Commission under section 5 of the Act, directly or indirectly, to sell, transport, transmit, or distribute, or own or operate any utility assets for the transportation, transmission, or distribution of, natural or manufactured gas or electric energy in interstate commerce, all as provided in section 4(a)(1) of the Act.

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9. Since December 1, 1935, it has been and is now unlawful for a holding company, which is not registered with the Commission under section 5 of the Act, directly or indirectly, to own, control, or hold with power to vote, any security of any subsidiary company thereof which directly or indirectly sells, transports, transmits, or distributes, or owns or

operates any utility assets for the transportation, transmission, or distribution of, natural or manufactured gas or electric energy in interstate commerce, all as provided in section 4(a) (1) and (6) of the Act. 6763

10. Since December 1, 1935, it has been and is now unlawful for a holding company, which is not registered with the Commission under section 5 of the Act, directly or indirectly, by use of the mails or any means or instrumentality of interstate commerce, to negotiate, enter into, or take any step in the performance of, any service, sales, or construction contract undertaking to perform services or construction work for, or sell goods to, any public-utility company or holding company, all as provided in section 4(a) (2) of the Act. 6764

11. Since December 1, 1935, it has been and is now unlawful for a holding company, which is not registered with the Commission under section 5 of the Act, directly or indirectly, to own, control, or hold with power to vote, any security of any subsidiary company thereof, which by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly negotiates, enters into, or takes any step in the performance of, any service, sales, or construction contract undertaking to perform services or construction work for, or sell goods to, any public-utility company or holding company, all as provided in section 4(a) (2) and (6) of the Act. 6765

12. Since December 1, 1935, it has been and is now unlawful for a holding company, which is not

registered with the Commission under section 5
6766 of the Act, directly or indirectly, to distribute or make any public offering for sale or exchange of any security of such holding company, any subsidiary company or affiliate of such holding company, any public-utility company, or any holding company, by use of the mails or any means or instrumentality of interstate commerce, or to sell any such security having reason to believe that such security, by use of the mails or any means or instrumentality of interstate commerce, will be distributed or made subject of a public offering, all as
6767 provided in section 4(a) (3) of the Act.

13. Since December 1, 1935, it has been and is now unlawful for a holding company, which is not registered with the Commission under section 5 of the Act, directly or indirectly, to own, control, or hold with power to vote, any security of any subsidiary company thereof which directly or indirectly distributes or makes any public offering for sale or exchange of any security of such holding company, any subsidiary company or affiliate of such holding company, any public-utility company,
6768 or any holding company, by use of the mails or any means or instrumentality of interstate commerce, or sells any such security having reason to believe that such security, by use of the mails or any means or instrumentality of interstate commerce, will be distributed or made the subject of a public offering, all as provided in section 4(a) (3) and (6) of the Act.

14. Since December 1, 1935, it has been and is now unlawful for a holding company, which is not

registered with the Commission under section 5 of the Act, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly to acquire or negotiate for the acquisition of any security or utility assets of any subsidiary company or affiliate of such holding company, any public-utility company, or any holding company, all as provided in section 4(a) (4) of the Act. 6769

15. Since December 1, 1935, it has been and is now unlawful for a holding company, which is not registered with the Commission under section 5 of the Act, directly or indirectly to own, control, or hold with power to vote, any security of any subsidiary company thereof which, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly acquires or negotiates for the acquisition of any security or utility assets of any subsidiary company or affiliate of such holding company, any public-utility company, or any holding company, all as provided in section 4(a) (4) and (6) of the Act. 6770

Defendants' violations of the Act

16. Each defendant has, since December 1, 1935, and is now, unlawfully engaged in conduct, activities, and transactions in violation of one or more provisions of section 4(a) of the Act, and unlawfully threatens to continue to engage in conduct, activities, and transactions in violation of one or more such provisions; and each defendant has, since December 1, 1935, unlawfully refrained, and is now unlawfully refraining, from registering with the Commission in compliance with the provisions of section 5 of the Act. 6771

THE CROSS-BILL AND REPLY

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17. The cross-bill as against the plaintiff and each of the cross-defendants should be dismissed with costs against the defendants and intervening defendants and a decree should be entered accordingly.

18. In so far as the cross-bill attempts to raise any issue in respect of, or seeks any relief from, the provisions of the Act applicable to non-registered holding companies (i.e., sections 4(a) and 5), the issues have been determined on the bill of complaint and the answer thereto; and the defendants and

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intervening defendants have no need, and are not entitled, to a determination of any such issue on the cross-bill.

19. In so far as the cross-bill seeks injunctive relief regarding the provisions of the Act applicable solely to registered holding companies, the cross-bill must be dismissed because the defendants and intervening defendants have not shown that they or any of them has suffered or is threatened with any irreparable or substantial injury, and without such a showing, there is no basis for injunctive re-

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lief.

20. In so far as the cross-bill attempts to raise any issue regarding the provisions of the Act applicable solely to registered holding companies, the cross-bill must be dismissed because there has been no threat or act by the plaintiff or any cross-defendant to enforce any such provision of the Act against any defendant or any intervening defendant, and there is no danger or justifiable fear of any such threat or act. In these circumstances,

the defendants and intervening defendants fail to make out any case or controversy with the plaintiff or any cross-defendant regarding any such issue. 6675

21. In so far as the cross-bill attempts to raise any issue regarding the provisions of the Act applicable solely to registered holding companies, the cross-bill must be dismissed because a determination of any such issue must be based upon the post-registration activities of the defendants and intervening defendants; and such a determination prior to registration and the occurrence of such activities and the prescribed administrative steps under the Act would be a determination upon a hypothetical case which the Court is without jurisdiction to make. 6776

22. In so far as the cross-bill seeks a declaratory judgment regarding any provision of the Act applicable solely to registered companies, the cross-bill must be dismissed because it presents no case of actual controversy and is therefore defective, and vests in the Court no jurisdiction, under the terms of the Federal Declaratory Judgments Act.

JULIAN W. MACK,
Julian W. Mack, 6777
Circuit Judge.

March 6, 1937.

These findings of fact and conclusions of law are approved as to form by the undersigned reserving all other questions.

SIMPSON THACHER & BARTLETT,
J. F. MacLANE

ROBERT H. JACKSON,
Assistant Atty General.

Decree

6778

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

NO. E81-378

At a stated term of the District Court of the United States in and for the Southern District of New York, held in the courtroom thereof in the Federal Court Building, City of New York, and State of New York, this November 11 and 12, 1936.

6779

Present:

HONORABLE JULIAN W. MACK,
Circuit Judge.

[SAME TITLE]

6780

This cause came on to be heard at this term, and was argued by counsel and submitted to the Court upon stipulated evidence including exhibits incorporated therein filed with the Court; and thereupon, upon consideration thereof, it is this 6th day of March, 1937, ordered, adjudged, and decreed in accordance with the written opinion herein filed and this Court's findings of fact and conclusions of law, viz.:

1. That the counterclaim and cross-bill of complaint filed in this cause by all the defendants and

intervening defendants against the plaintiff Securities and Exchange Commission (hereinafter called the plaintiff) and against the cross-defendants Homer S. Cummings, Attorney General of the United States, James A. Farley, Postmaster General of the United States, James M. Landis, Robert E. Healy, George C. Mathews, James D. Ross, and William O. Douglas, members of the Securities and Exchange Commission, is dismissed for want of equity, and for lack of any actual controversy within the meaning of the Federal Declaratory Judgment Act of 1934. 6781

2. That an injunction be, and the same hereby is, allowed as prayed for in the plaintiff's amended and supplemental bill of complaint; and that such injunction is made perpetual; and that Electric Bond and Share Company, American Gas and Electric Company, American Power & Light Company, National Power & Light Company, Electric Power & Light Corporation, United Gas Corporation, Power Securities Corporation, Lehigh Power Securities Corporation, Utah Power & Light Company, United Gas Public Service Company, Houston Gulf Gas Company, Nebraska Power Company, and Pacific Power & Light Company (hereinafter called the defendants) and their servants, agents, and attorneys are permanently ordered, restrained, and enjoined in the manner set down hereinafter in this decree. 6782 6783

3. That, as to each of said defendants, commencing on the thirtieth day after the day of this decree and continuing until such defendant shall cease to be a holding company as defined in section

2(a)(7) of the Public Utility Holding Company
6784 Act of 1935 or shall register with the plaintiff as provided in sections 4(a) and 5(a) of said Act, such defendant shall not, directly or indirectly—

(a) sell, transport, transmit, or distribute, or own or operate any utility assets for the transportation, transmission, or distribution of, natural or manufactured gas or electric energy in interstate commerce;

(b) own, control, or hold with power to vote, any security of any subsidiary company of such
6785 defendant that sells, transports, transmits, or distributes, or owns or operates any utility assets for the transportation, transmission, or distribution of, natural or manufactured gas or electric energy in interstate commerce;

(c) by use of the mails or any means or instrumentality of interstate commerce, negotiate, enter into, or take any step in the performance of, any service, sales, or construction contract undertaking to perform services or
6786 construction work for, or sell goods to, any public-utility company or holding company;

(d) own, control, or hold with power to vote, any security of any subsidiary company of such defendant that, by use of the mails or any means or instrumentality of interstate commerce, negotiates, enters into, or takes any step in the performance of, any service, sales, or construction contract undertaking to perform services or construction work for, or sell

goods to, any public-utility company or holding company; 6787

(e) distribute or make any public offering for sale or exchange of any security of such defendant, any subsidiary company or affiliate of such defendant, any public-utility company, or any holding company, by use of the mails or any means or instrumentality of interstate commerce, or sell any such security having reason to believe that such security, by use of the mails or any means or instrumentality of interstate commerce, will be distributed or made the subject of a public offering; 6788

(f) own, control, or hold with power to vote, any security of any subsidiary company of such defendant that distributes or makes any public offering for sale or exchange of any security of such defendant, any subsidiary company or affiliate of such defendant, any public-utility company, or any holding company, by use of the mails or any means or instrumentality of interstate commerce, or sells any such security having reason to believe that such security, by use of the mails or any means or instrumentality of interstate commerce, will be distributed or made the subject of a public offering; 6789

(g) by use of the mails or any means or instrumentality of interstate commerce, acquire or negotiate for the acquisition of any security or utility assets of any subsidiary company or affiliate of such defendant, any public-utility company, or any holding company; or

6790 (h) own, control, or hold with power to vote, any security of any subsidiary company of such defendant that, by use of the mails or any means or instrumentality of interstate commerce, acquires or negotiates for the acquisition of any security or utility assets of any subsidiary company or affiliate of such defendant, any public-utility company, or any holding company.

6791 (i) The terms "utility assets," "interstate commerce," "security," "subsidiary company," "service, sales or construction contract," "affiliate," "public utility company" and "holding company" as used in this paragraph shall mean those terms as defined in the Public Utility Holding Company Act.

5. This decree, the dismissal of the counterclaim and cross-bill, and the injunction herein provided for, shall be without prejudice to any rights or remedies in law or in equity which the defendants may have or be entitled to after registering as holding companies as provided in Sections 4(a)
6792 and 5(a) of the Public Utility Holding Company Act of 1935; and such registration shall be entirely without prejudice to the right of any such defendant to question the validity of any of the provisions of said Act other than the provisions contained in Sections 4(a) and 5 thereof.

6. This decree, the dismissal of the counterclaim and cross-bill shall be without prejudice to any rights or remedies in law or in equity which the

intervening defendants may have or be entitled to upon the Act being made applicable to them by the registration of any holding company of which they are subsidiary companies. 6793

7. In the event defendants, or any of them, shall take an appeal from this decree, prior to the effective date of the injunction as specified in paragraph 3 hereof, and shall perfect said appeal within the time allowed by law, the said injunction shall be stayed as to the appealing defendants without further bond or supersedeas order, pending the determination of said appeal either by the Circuit Court of Appeals or by the Supreme Court of the United States, if it shall be there removed by certiorari or other process, and until thirty days after the filing of the mandate of the appellate court in this Court. 6794

8. That the plaintiff and the cross-defendants recover from the defendants their costs herein, the same to be taxed by the clerk of this Court, and that the plaintiff and cross-defendants have execution therefor.

9. Any party may apply for further directions at the foot of this decree, and this Court retains jurisdiction for further orders at this or future terms of this Court. 6795

JULIAN W. MACK,
Julian W. Mack,
Circuit Judge.

Dated March 6, 1937.

This decree is approved as to form by the undersigned reserving all other questions.

SIMPSON THACHER & BARTLETT,
J. F. MacLANE.

ROBERT H. JACKSON,
Assistant Atty General.

Petition for Appeal

6796

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

6797

Each of the defendants and intervening defendants herein:

Electric Bond and Share Company
American Gas and Electric Company
American Power & Light Company
National Power & Light Company
Electric Power & Light Corporation
United Gas Corporation
Power Securities Corporation
Lehigh Power Securities Corporation

6798

Utah Power & Light Company
Nebraska Power Company
Pacific Power & Light Company
United Gas Public Service Company
Houston Gulf Gas Company
Appalachian Electric Power Company
Atlantic City Electric Company
Easton Consolidated Electric Company
The Ohio Power Company
Pennsylvania Power & Light Company

The Scranton Electric Company
The Washington Water Power Company
Central Arizona Light and Power Company
Indiana & Michigan Electric Company
Idaho Power Company
The Montana Power Company
Spokane United Railways
Spokane Central Heating Company
Montana Power Gas Company

6799

feeling itself aggrieved by the decree dated March 6, 1937, and entered in this cause on the 8th day of March, 1937, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the Assignment of Errors which is filed herewith, and each of them prays that this appeal be allowed and that Citation issue, as provided by law, and that a transcript of the record, proceedings and papers on which the said decree was based be made and duly authenticated and sent to said United States Circuit Court of Appeals sitting in the United States Court House at Foley Square, New York, N. Y.

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And each of your petitioners further prays that the proper order be made and entered fixing the amount of security for costs required to perfect this appeal and that, in accordance with the provisions of said decree, this appeal upon being perfected within the time allowed by law shall operate, without your petitioners furnishing security other than for costs, as a stay of the injunction contained in said decree as to the appealing defendants and intervening defendants pending the determination of said appeal by said United States Circuit Court of

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6802 Appeals or by the Supreme Court of the United States, if it shall be there removed by certiorari or other process, and until thirty days after the filing of the mandate of the appellate court in this Court.

Dated, April 5, 1937.

THOMAS D. THACHER.
JOHN F. MacLANE,
Solicitors for Defendants
and Intervening Defendants.

6803 REID AND PRIEST,
A. J. G. PRIEST,
Of Counsel for Defendants Electric Bond and Share Company, American Power & Light Company, National Power & Light Company and Electric Power & Light Corporation.

M. F. MILLIKAN,
Of Counsel for Defendants American Gas and Electric Company, Appalachian Electric Power Company, The Ohio Power Company, The Scranton Electric Company and Atlantic City Electric Company.

6804

Assignment of Errors and Prayer for Reversal

6805

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Now, on this 5th day of April, 1937, come the following defendants herein (hereinafter called the "defendants"), to wit:

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Electric Bond and Share Company
American Gas and Electric Company
American Power & Light Company
National Power & Light Company
Electric Power & Light Corporation
United Gas Corporation
Power Securities Corporation
Lehigh Power Securities Corporation
Utah Power & Light Company
Nebraska Power Company
Pacific Power & Light Company
United Gas Public Service Company
Houston Gulf Gas Company

6807

and the following defendants (hereinafter called the "intervening defendants"), to wit:

Appalachian Electric Power Company
Atlantic City Electric Company
Easton Consolidated Electric Company
The Ohio Power Company

Pennsylvania Power & Light Company
6808 The Scranton Electric Company
The Washington Water Power Company
Central Arizona Light and Power Company
Indiana & Michigan Electric Company
Idaho Power Company
The Montana Power Company
Spokane United Railways
Spokane Central Heating Company
Montana Power Gas Company

by their solicitors, Thomas D. Thacher and John
6809 F. MacLane, as solicitors for all of said defendants and intervening defendants (and by counsel whose names are subscribed hereto for the several defendants and intervening defendants), and having prayed for an appeal or appeals to the United States Circuit Court of Appeals for the Second Circuit from the decree dated March 6, 1937, and entered in the above entitled cause on the 8th day of March, 1937, by the District Court of the United States for the Southern District of New York, say that said decree is erroneous and unjust to each of said defendants and intervening defendants severally in the particulars hereinafter stated upon
6810 which they and each of them will rely upon the prosecution of their said appeal or appeals.

Assignment of Errors and Prayer for Reversal

I.

6811

Error in holding that Sections 4 (a) and 5 of the Public Utility Holding Company Act of 1935 (hereinafter called the "Act") constitute a constitutional, valid and reasonable regulation of interstate commerce and the mails.

Each of said defendants for itself severally says that the Court erred:

1. In its conclusion No. 5 that Sections 4(a) and 5 of the Act as applicable to these defendants and each of them and their acts and transactions are valid and constitutional;

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2. In its conclusions subsidiary to conclusion No. 5, to wit:

(a) in its conclusion No. 6 that Sections 4(a) and 5 of the Act as applicable to each of the defendants and to the acts and transactions of each of them, are a fair and reasonable and valid regulation of commerce among the several states;

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(b) in its conclusion No. 6 that said sections as so applied are a fair and reasonable and valid regulation of the mails;

(c) in its conclusion No. 6 that said sections as so applied involve no improper delegation to the plaintiff of legislative power;

6814 (d) in its conclusion No. 6 that said sections as so applied do not violate the Fifth Amendment of the Constitution of the United States;

(e) in its conclusion No. 6 that said sections as so applied do not violate the Tenth Amendment of the Constitution of the United States;

(f) in its conclusion No. 6 that said sections as so applied do not violate any other
6815 provision of the Constitution of the United States;

(g) in its conclusion No. 7 that the terms holding company and subsidiary company as used in Sections 4(a) and 5 of the Act are defined in Section 2(a) thereof with definiteness and certainty, and are reasonable, proper and valid;

(h) in its conclusion No. 7 that the remaining terms used in Sections 4(a) and 5 of
6816 the Act are defined in Section 2(a) thereof with definiteness and certainty, and are reasonable, proper and valid;

3. In its finding No. 26 that it is reasonable that holding companies (and each defendant as a holding company) controlling their respective subsidiary companies, within the meaning of the Act, be made responsible for the acts of such subsidiary companies, and that where there is such control it is the holding company that causes the activities of its subsidiary companies to be carried on;

4. In its finding No. 26 that Section 4(a) (6) of the Act is a reasonable attempt, without any denial of the separateness of the corporations as such, to charge holding companies (and each defendant as a holding company) with responsibility for the activities in interstate commerce and the mails in which they cause their subsidiary companies to engage; 6817

5. In its finding No. 26 that Section 4(a) (6) of the Act is an essential part of the regulations in Section 4(a), if such regulations are to have any effect and are not to be susceptible of ready evasion; 6818

6. In its finding No. 27 that the limitation of the application of the Act and of the provisions of Sections 4(a) and 5 to holding companies which control electric and gas utility subsidiary companies involves no arbitrary selection or classification, and that the findings of Congress which prompted it to adopt the classification in the Act are not shown to be unfounded or unreasonable;

7. In its finding No. 28 that the terms holding company and subsidiary company within the meaning of Sections 4(a) and 5 of the Act are defined by Section 2(a) of the Act with reasonableness, definiteness and certainty, and that the inclusion of the defendants and their subsidiary companies within such terms is reasonable; 6819

8. In its conclusion No. 8 that it is unlawful for an unregistered holding company, directly or indirectly, to sell, transport, transmit, or distribute, or own or operate any utility assets for the trans-

portation, transmission, or distribution, of natural
6820 or manufactured gas or electric energy in interstate commerce;

9. In its conclusion No. 9 that it is unlawful for an unregistered holding company, directly or indirectly, to own, control, or hold with power to vote, any security of a subsidiary company thereof which does any of the things referred to in the preceding paragraph;

10. In its conclusion No. 10 that it is unlawful for an unregistered holding company, directly or
6821 indirectly, by use of the mails or any means or instrumentality of interstate commerce, to negotiate, enter into, or take any steps in the performance of any service, sales or construction contract with any public utility or holding company;

11. In its conclusion No. 11 that it is unlawful for an unregistered holding company, directly or indirectly, to own, control, or hold with power to vote, any security of any subsidiary company thereof which does any of the acts referred to in the preceding paragraph;
6822

12. In its conclusion No. 12 that it is unlawful for an unregistered holding company, directly or indirectly, to distribute or make any public offering for sale or exchange of any security of such holding company or of its subsidiary companies or affiliates, or of any public utility or holding company, by use of the mails or any means or instrumentality of interstate commerce, or to sell such security, having reason to believe that such se-

curity, by use of the mails or any means or instrumentality of interstate commerce, will be distributed or made subject of a public offering; 6823

13. In its conclusion No. 13 that it is unlawful for an unregistered holding company, directly or indirectly, to own, control, or hold with power to vote, any security of any subsidiary company thereof which does any of the acts referred to in the preceding paragraph;

14. In its conclusion No. 14 that it is unlawful for an unregistered holding company, directly or indirectly, by use of the mails or any means or 6824
instrumentality of interstate commerce, to acquire or negotiate for the acquisition of any security or utility assets of any of its subsidiary companies or affiliates or of any public utility or holding company;

15. In its conclusion No. 15 that it is unlawful for an unregistered holding company, directly or indirectly, to own, control, or hold with power to vote any security of any subsidiary company thereof which does any of the things referred to in the preceding paragraph; 6825

16. In its conclusion No. 16 that each defendant has since December 1, 1935, and is now "unlawfully" engaged in conduct, activities, and transactions in violation of one or more of the provisions of section 4(a) of the Act and "unlawfully" threatens to continue so to engage;

17. In its conclusion No. 16 that each defendant has "unlawfully" refrained, and is now "un-

lawfully" refraining from registering with the Com-
6826 mission, in compliance with Section 5 of the Act;

18. In not concluding, as a matter of law, that:

(a) Sections 4(a) and 5 of the Act, and each of said Sections, in their application to each of the defendants do not constitute a regulation of either interstate or foreign commerce within Section 8 of Article I of the Constitution of the United States;

(b) said Sections, and each of them, attempt
6827 to regulate, without distinction and by inseparable provisions, both companies engaged in interstate commerce and in activities directly affecting interstate commerce and companies not so engaged, and activities within the Federal power under the Commerce Clause, and activities not within such power;

(c) said Sections, and each of them, in their application to each of the defendants are in excess of the powers granted to Congress by Section 8 of Article I of the Constitution of
6828 the United States to establish post offices and post roads;

(d) said Sections, and each of them, as so applied are in violation of the Tenth Amendment of the Constitution of the United States;

(e) said Sections, and each of them, as so applied involve an unlawful delegation of legislative power to plaintiff Commission in viola-

tion of Section 1 of Article I of the Constitution of the United States, and provide no adequate standards by which the action of the Commission is to be guided or controlled in the application or non-application of said Sections to holding companies such as defendants; 6829

(f) said Sections, and each of them, as so applied deprive each of the defendants of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States;

19. In not concluding, as a matter of law, that conditioning the right to use the mails and the means and instrumentalities of interstate commerce and to transact business in interstate commerce in connection with the activities specified in Section 4(a) upon the filing of the notification of registration required by Section 5(a) is not within the power of Congress under the Postal or Commerce Clauses or that it violates Section 1 of Article I of the Constitution of the United States; 6830

20. In not finding as a fact or concluding, as a matter of law, that the prohibitions contained in Section 4(a) are not and were not intended by Congress to be a regulation of the mails or of interstate commerce or of the means or instrumentalities thereof, but are and were intended by Congress to be merely a penalty for failure to comply with the remaining provisions of the Act; 6831

21. In not concluding, as a matter of law, that the prohibitions contained in Section 4(a) are invalid and unconstitutional because they deny to

6832 each defendant the right and privilege to engage in interstate commerce and to use the mails and instrumentalities of interstate commerce in ordinary business transactions, not as a regulation of such use or of such transactions but as a coercive and arbitrary penalty;

22. In not concluding, as a matter of law, that the prohibitions of Section 4(a) in effect require each defendant to register and to subject itself to all of the provisions of the Act applicable to registered holding companies;

6833 23. In requiring each of the defendants in effect to register under Section 5(a) and thereby to subject itself and each of its subsidiaries to regulation under all of the subsequent provisions of the Act without a determination as to which, if any, of said provisions may validly be enforced by criminal prosecution against them and their officers.

II.

6834 *Error in holding that Sections 4(a) and 5 of said Act are separable from the remaining provisions thereof and that the various provisions of said sections are separable from each other.*

Each of said defendants for itself severally says that the Court erred:

24. In its finding of fact No. 13 that Sections 4(a) and 5 of the Act are separate and separable from the other provisions of the Act;

25. In its conclusion of law No. 3 to the same effect; 6835

26. In its finding of fact No. 13 that the provisions within Sections 4(a) and 5 of the Act are separate and separable among themselves;

27. In its conclusion of law No. 3 to the same effect;

28. In its findings of fact and conclusions of law subsidiary to finding of fact No. 13 and conclusion of law No. 3, to wit: 6836

(a) in its finding No. 14, that Congress intended Sections 4(a) and 5 to be separate and separable from the other provisions of the Act;

(b) in its finding No. 15 that defendants have not offered evidence sufficient to overcome the presumption of the separability of Sections 4(a) and 5 created by Section 32 of said Act;

(c) in its finding No. 16 that the statement of the policy of the Act in Section 1(c) negatives any conclusion that simplification or elimination of holding companies is the sole policy or whole end or object of the Act and that such simplification or elimination is only one of the means adopted to effectuate the end and object of the Act; 6837

(d) in its finding No. 17 that there is nothing in the Act or its legislative history to indi-

cate that Congress would not have enacted Sec-
6838 tions 4(a) and 5 alone;

(e) in its finding No. 18 that the separability of Sections 4(a) and 5 of the Act as a regulatory device is not altered by their relation to the other provisions of the Act and that there is no essential interdependence between such sections and such other provisions;

(f) in its conclusion No. 4 to the same effect;

6839 (g) in its finding No. 19 that Sections 4(a) and 5 of the Act serve a useful and practicable purpose of regulation by publicity and standing alone constitute a workable law to which legal effect can be given;

(h) in its conclusion No. 4 to the same effect;

(i) in its finding No. 19 that such regulation by publicity is reasonably related to the alleged evils and abuses sought to be corrected
6840 by the Act;

(j) in its finding No. 20 that enforced publicity, as required by Section 5 of the Act, will materially aid as a corrective measure in eliminating such alleged abuses and evils;

(k) in its finding No. 21, that the information required by Section 5 will be of value to investors and of appreciable service to state regulatory commissions and consumers;

(l) in its finding No. 23 that the information required under Section 5 of the Act is reasonably connected with the alleged evils sought to be remedied by the Act; 6841

(m) in its finding No. 24 that conditioning the use of the mails and the channels of interstate commerce by holding companies upon their registration and filing of information in accordance with Section 5 is a reasonable method of controlling the alleged holding company evils and abuses at which the Act is directed, including evils and abuses growing out of the transactions specified in Section 4(a) of the Act; 6842

29. In not finding as a fact or concluding as a matter of law that Sections 4(a) and 5 are inseparable from the substantive regulatory system of the Act and constitute merely a device to effectuate the enforcement of such system;

30. In not finding as a fact or concluding as a matter of law that the registration required by Sections 4 and 5(a) is not a means of securing information but is in effect the acceptance of a license under which each of the defendants is permitted to do the things otherwise prohibited by Section 4(a) of the Act and necessary for the conduct of ordinary business, only upon the terms and conditions prescribed by subsequent sections of the Act, and that the registration requirement of Sections 4 and 5(a) is merely the mechanism by which the plaintiff Securities and Exchange Commission is sought by the provisions of said Act to be given 6843

perpetual control over the operations of each of the
6844 defendants for the purpose, among others, of giving effect to the provisions of Section 11;

31. In not finding as a fact or concluding as a matter of law that the information required by Section 5(b) is not related to regulation of and was not intended by Congress to be a regulation of the activities specified in Section 4(a);

32. In not finding as a fact or concluding as a matter of law that the information required by Section 5(b) was intended by Congress primarily to
6845 aid plaintiff Commission in the administration of the other Sections of the Act applicable to registered holding companies;

33. In not finding as a fact or concluding as a matter of law that the prohibitions contained in Section 4(a) are not and were not intended by Congress to be, a regulation of the mails or of interstate commerce or of the means or instrumentalities thereof but are and were intended by Congress to be merely a penalty for failure to comply with the
6846 remaining provisions of the Act which are themselves unconstitutional.

III.

Error in not holding that the substantive regulatory system prescribed by the Act subsequent to the registration provisions is unconstitutional.

Each of the defendants for itself severally says that the Court erred:

34. In not concluding, as a matter of law, that the substantive regulatory system prescribed by the Act subsequent to the registration provisions is unconstitutional and void in its application to each defendant for one or more of the following reasons: 6847

(a) Because it does not constitute a regulation of either interstate or foreign commerce within Section 8 of Article I of the Constitution of the United States;

(b) Because it attempts to regulate, without distinction and by inseparable provisions, both companies engaged in interstate commerce or in activities directly affecting interstate commerce, and companies not so engaged, and activities within the Federal power under the Commerce Clause and activities not within such power; 6848

(c) Because it is in excess of the powers granted to Congress by Section 8 of Article I of the Constitution of the United States to establish post offices and post roads;

(d) Because it violates the Tenth Amendment of the Constitution of the United States; 6849

(e) Because it involves an unlawful delegation of legislative power to plaintiff Commission, in violation of Section 1 of Article I of the Constitution of the United States and provides no adequate standards by which the action of the Commission is to be guided or controlled;

6850 (f) Because it deprives each of the defendants of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States;

35. In not concluding, as a matter of law, that each of the following sections of said Act, to wit, Sections 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 26 and 29 is unconstitutional and void in its application to each defendant (failure to conclude, as a matter of law, that each of said sections is unconstitutional and void being hereby separately assigned as error) for one or more of the reasons stated in subpara-
6851 graphs (a) to (f), inclusive, of Assignment of Error No. 34.

IV.

Error in dismissing defendants' counter-claim and cross-bill.

Each of the defendants for itself severally says that the Court erred:

6852 36. In dismissing as against the cross-defendants herein as individuals for want of equity the counter-claim and cross-bill of complaint;

37. In dismissing as against the cross-defendants herein as individuals for lack of any actual controversy within the meaning of the Federal Declaratory Judgment Act of 1934, the counter-claim and cross-bill of complaint;

38. In not awarding an injunction against the said cross-defendants restraining and enjoining

them from enforcing against each of said defendants the Act as a whole, and one or more of the following Sections of said Act, to wit, Sections 4, 5(b), 5, 6, 7, 8, 10, 11, 12, 13, 15 and 29 (failure to award an injunction against the enforcement of said Act as a whole and each of said Sections being hereby separately assigned as error); 6853

39. In refusing to enter a declaratory judgment that said Act in its entirety is unconstitutional and void and that one or more of the following Sections of said Act, to wit, Sections 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 26 and 29 are unconstitutional and void (failure to enter such a declaratory judgment as to the Act in its entirety and as to each of said Sections being hereby separately assigned as error); 6854

40. In its conclusion No. 1 that no justiciable case or controversy is presented by the pleadings except that regarding the validity and effect of Sections 4(a) and 5 of the Act;

41. In its conclusion No. 17 that the cross-bill as against the cross-defendants should be dismissed;

42. In its conclusions subsidiary to its conclusions Nos. 1 and 17 to wit: 6855

(a) in conclusion No. 18 that defendants are not entitled by cross-bill to raise any issue in respect of or seek any relief from the provisions of the Act applicable to non-registered holding companies (i.e. Sections 4(a) and 5);

(b) in conclusion No. 19, that the cross-bill must be dismissed in so far as it seeks injunc-

6856 tive relief regarding the provisions of the Act applicable to registered holding companies because defendants and intervening defendants have not shown that any of them has suffered or is threatened with irreparable or substantial injury;

(c) in conclusion No. 20, that there has been no threat or act by the plaintiff or cross-defendants to enforce any provisions of the Act applicable solely to registered holding companies against any of the defendants, that there is no danger or justifiable fear of any such
6857 threat or act, and that therefore the cross-bill, in so far as it attempts to raise any issue regarding the provisions of the Act applicable solely to registered holding companies, must be dismissed because defendants have failed to show a case or controversy with the plaintiff or any cross-defendant;

(d) in conclusion No. 21, that the cross-bill in so far as it attempts to raise any issues regarding provisions of the Act applicable
6858 solely to registered holding companies must be dismissed because determination of such issues must be based upon post-registration activities of the defendants and that such a determination prior to registration would be upon a hypothetical case;

(e) in conclusion No. 22 that the cross-bill in so far as it seeks a declaratory judgment regarding any provision of the Act applicable solely to registered companies presents no case

of actual controversy and vests in the Court no jurisdiction under the terms of the Federal Declaratory Judgment Act; 6859

43. In its finding of fact No. 64 that no provision of the Act other than the provisions of Sections 4 and 5(a) has been threatened by the plaintiff or any cross-defendant or any other officer or agency of the United States to be applied to any of the defendants;

44. In its finding of fact No. 65 that the filing by the plaintiff of its bill of complaint in this proceeding and its prosecution thereof constitute the sole act, conduct or threat by the plaintiff or any cross-defendant or any other officer or agency of the United States to enforce the Act or any part thereof or any rule, regulation or order thereunder against the defendants or any of them or against any subsidiary company or affiliate of any defendant or any director, officer, employee or agent of any defendant and that such act, conduct and threat are solely in respect of the civil enforcement of the provisions of Sections 4(a) and 5 of the Act and of the rules and regulations thereunder; 6860 6861

45. In its finding of fact No. 66 that there is no evidence that any defendant or any subsidiary company of any defendant has suffered or is suffering any irreparable or substantial damage, impending or threatened, by reason of any act, conduct or threat of the plaintiff or any cross-defendant or any other officer or agency of the United States or by reason of the existence of the Act or any provision thereof or any rule, regulation or order thereunder;

6862 46. In its finding of fact No. 66, that until the provisions of the Act other than Sections 4(a) and 5 become applicable to the defendants, neither they nor their subsidiary companies show any irreparable or substantial injury, impending or threatened;

47. In its finding of fact No. 67, that it cannot determine in what manner, to what extent or in what circumstances any provision of the Act or the rules, regulations or orders thereunder will become applicable to any defendant; that the Court would not be justified under the circumstances in
6863 deciding intricate constitutional questions; that such determination should be based upon post-registration activities of the defendants; and that the Court cannot on the record before it determine whether the post-registration activities of the defendants will or will not amount to a violation of one or more of the provisions pertaining to registered holding companies;

48. In its finding of fact No. 22, that no defendant and no subsidiary company of any defendant will be caused any cost by complying with the provisions of Sections 4(a) and 5 other than the cost
6864 of preparing and filing notifications of registration and registration statements under Section 5 of the Act, if cost as thus used means anything other than out-of-pocket expense;

49. In its conclusion of law No. 2 that the compliance by any defendant with Sections 4(a) and 5 of the Act will not impair any constitutional, legal or other right of such defendant;

50. In not finding as a fact that the provisions of the Act applicable to registered holding companies have caused and will continue to cause irreparable damage to the defendants as unregistered holding companies so long as Sections 4 and 5(a) are not declared unconstitutional and so long as the constitutionality of the provisions applicable to registered holding companies remains undetermined, because no defendant can know whether it will be permitted to continue to exist and if so what properties it will be permitted to continue to own, and therefore; 6865

(a) no defendant, whether registered or unregistered, can issue or sell any of its securities at a reasonable price; 6866

(b) no defendant, whether registered or unregistered, can acquire any public utility or holding company securities or any utility assets, except from subsidiaries, because it cannot know whether or not it will be permitted to retain them;

(c) the credit of each defendant, whether registered or unregistered, will continue to be impaired; 6867

(d) no defendant, whether registered or unregistered, can make any long term employment, or other contracts;

51. In not finding as a fact that immediately upon entry of a decree enjoining the defendants from violating any of the provisions of Section

6868 4(a) until they register under Section 5(a), the defendants are in effect ordered to register and are placed in the position of registered holding companies and thereupon the provisions of the Act applicable to registered holding companies, if unconstitutional, cause them irreparable damage, regardless of any administrative action which may be taken by the Commission in one or more of the following particulars:

6869 (a) Defendant Electric Bond and Share Company is prohibited by Section 13 and the provisions of Section 29 from performing service or construction contracts and its subsidiary Ebasco Services Incorporated, is required to perform such contracts at cost under the rules and regulations prescribed by plaintiff Commission and without profit, thereby destroying a valuable and profitable business;

(b) Defendant American Gas and Electric Company is similarly prohibited from performing any service or construction contracts;

6870 (c) Defendants Electric Bond and Share Company, American Power & Light Company, Electric Power & Light Corporation and National Power & Light Company and each of them are severally damaged irreparably by the mandatory requirement of reorganization and dismemberment under Section 11 of said Act and the orders of the Commission required to be made thereunder;

(d) Each of the remaining defendants are likewise irreparably damaged by the threat

that the provisions of Section 11 and the orders of the Commission thereunder may require their dismemberment and reorganization; 6871

(e) Each of the defendants is likewise damaged by the provisions of Section 11 in that they cannot know whether they will be permitted to continue to exist and if so, what properties they will be permitted to continue to own and therefore cannot issue or sell securities at a reasonable price, acquire securities of public utility or holding companies or utility assets or make long term employment or other contracts and their credit will continue to be impaired; 6872

(f) Each of said defendants is irreparably damaged by the remaining provisions of the Act, and particularly Sections 6 to 10 and 12 thereof, whereby its ordinary and normal business transactions and those of its subsidiaries are subjected to regulation in the uncontrolled discretion of the Commission.

V. 6873

Error in refusing relief prayed by intervening defendants.

Each of the intervening defendants above named for itself severally says that the Court erred:

52. In dismissing the cross-bill against the cross-defendants herein as individuals for want of equity;

6874 53. In dismissing the cross-bill against the cross-defendants as individuals for lack of any actual controversy within the meaning of the Federal Declaratory Judgment Act;

54. In each and every particular hereinabove assigned as error by the defendants in assignments Nos. 1 to 51, inclusive, each of said intervening defendants hereby severally assigning as error as against it each of the matters specified in said assignments and incorporating such assignments herein by reference;

6875 55. In not awarding an injunction against the said cross-defendants as individuals restraining and enjoining them from enforcing against each of the intervening defendants the Act as a whole and one or more of the following Sections of said Act, to wit, Sections 6, 7, 8, 9, 10, 11, 12, 13, 15, 26 and 29 (failure to award an injunction against the enforcement of said Act as a whole and each of said Sections being hereby separately assigned as error);

6876 56. In not entering a declaratory judgment that said Act in its entirety is unconstitutional and void and that one or more of the following Sections of said Act are unconstitutional and void, to wit, Sections 6, 7, 8, 9, 10, 11, 12, 13, 15, 26 and 29 (failure to enter such a declaratory judgment as to the Act in its entirety and as to each of said Sections being hereby separately assigned as error);

57. In its conclusion of law No. 1 that no justiciable case or controversy is presented by plaintiff's

bill of complaint and the intervening defendants' answer thereto, except that regarding the validity and effect of Sections 4(a) and 5 of the Act as applicable to each of the defendants; 6877

58. In its conclusion of law No. 17 that the cross-bill as against the cross-defendants as individuals should be dismissed.

59. In its conclusion of law No. 18 that the intervening defendants are not entitled to raise any issue in respect of or seek any relief from the provisions of the Act applicable to non-registered holding companies (i. e. Sections 4(a) and 5); 6878

60. In its conclusion of law No. 19 that the cross-bill must be dismissed in so far as it seeks injunctive relief against the cross-defendants as individuals because the intervening defendants have not shown that any of them has suffered or is threatened with irreparable or substantial injury under the provisions of the Act applicable solely to registered holding companies;

61. In its conclusion No. 20, that there has been no threat or act by the plaintiff or cross-defendants to enforce any provisions of the Act applicable solely to registered holding companies against any intervening defendant, that there is no danger or justifiable fear of any such threat or act and that therefore the cross-bill in so far as it attempts to raise any issue regarding the provisions of the Act applicable solely to registered holding companies must be dismissed because the intervening defendants have failed to show a case or controversy with the plaintiff or any cross-defendant; 6879

6880 62. In its conclusion No. 21 that the cross-bill must be dismissed because determination of issues applicable solely to registered holding companies must be based upon the post-registration activities of the intervening defendants and that such a determination prior to registration would be upon a hypothetical case;

63. In its finding of fact No. 66 that there is no evidence that any subsidiary company of any defendant has suffered or is suffering any irreparable or substantial damage, impending or threatened,
6881 by reason of any act, conduct or threat of the plaintiff or any cross-defendant or any other officer or agency of the United States, or by reason of the existence of the Act or any provision thereof or any rule, regulation or order thereunder;

64. In its finding of fact No. 66 that until the provisions of the Act other than Sections 4(a) and 5 become applicable to the defendants their subsidiary companies do not suffer any irreparable or substantial injury, impending or threatened;

6882 65. In not concluding, as a matter of law, that the substantive system of regulation prescribed by the Act for subsidiary companies of registered holding companies is unconstitutional and void in its application to each intervening defendant for one or more of the following reasons:

(a) Because it does not constitute a regulation of either interstate or foreign commerce within Section 8 of Article I of the Constitution of the United States;

(b) Because it attempts to regulate, without distinction and by inseparable provisions, both companies engaged in interstate commerce and in activities directly affecting interstate commerce, and companies not so engaged, and activities within the Federal power under the Commerce Clause and activities not within such power; 6883

(c) Because it is in excess of the powers granted to Congress by Section 8 of Article I of the Constitution of the United States to establish post offices and post roads; 6884

(d) Because it violates the Tenth Amendment of the Constitution of the United States;

(e) Because it involves an unlawful delegation of legislative power to plaintiff Commission in violation of Section 1 of Article I of the Constitution of the United States, and provides no adequate standards by which the action of the Commission is to be guided or controlled;

(f) Because it deprives each of the intervening defendants of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States; 6885

66. In not concluding, as a matter of law, that each of the following sections of said Act, to wit, Sections 6, 7, 8, 9, 10, 11, 12, 13, 15, 26 and 25 is unconstitutional and void in its application to each intervening defendant (failure to conclude, as a

matter of law, that each of said sections is unconstitutional and void being hereby separately assigned as error) for one or more of the reasons stated in subparagraph (a) to (f), inclusive, of Assignment of Error No. 65;

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67. In its finding of fact No. 68 that the intervening defendants are without right or standing as subsidiary companies of non-registered holding companies to defeat the plaintiff's right to relief as prayed for against the defendants, and are without right or standing, in this proceeding, to an adjudication as to what their rights, liabilities and duties as subsidiaries of registered holding companies would be if hereafter any of the defendants should become registered holding companies;

6887

68. In not concluding, as a matter of law, that the entry of a decree enjoining the defendants from violating any of the provisions of Section 4(a) and thus in effect compelling such defendants to register, thereby subjects the intervening defendants Spokane United Railways, Spokane Central Heating Company, Montana Power Gas Company and Central Arizona Light and Power Company, as subsidiary companies of registered holding companies, without any act or consent on their part, to regulation of their purely intrastate business pursuant to the sections of the Act applicable to subsidiary companies of registered holding companies, and that such regulation is in excess of the powers granted to Congress by Section 8 of Article I of the Constitution of the United States and is in violation of the Fifth and Tenth Amendments of the Constitution of the United States.

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VI. 6889

Error in granting injunction decree.

Each of said defendants and intervening defendants for itself severally says that the Court erred:

69. In allowing and awarding an injunction against each of the defendants and their servants, agents and attorneys, commencing on the thirtieth day after the date of the decree and continuing until each such defendant ceases to be a holding company or registers with the plaintiff, enjoining them from directly or indirectly engaging in any of 6890
the activities specified in subparagraphs (a) to (h), inclusive, of paragraph 3 of the decree (the allowance and awarding of an injunction against engaging in each of the activities specified in each of the said subparagraphs being hereby separately assigned as error);

70. In not entering a decree dismissing plaintiff's amended and supplemental bill of complaint.

WHEREFORE for the errors aforesaid, each of 6891
the said above-named defendants and intervening defendants pray that the said decree of the United States District Court, for the Southern District of New York, dated on the 6th day of March, 1937, and filed and entered in the above entitled cause on the 8th day of March, 1937, be reversed and that said District Court be directed to enter a decree dismissing the plaintiff's bill of complaint and granting to defendants and intervening defendants the relief prayed for in their cross-bill and bill of intervention.

Dated this 5th day of April, 1937, and filed with
6892 defendants' petition for appeal.

THOMAS D. THACHER,
JOHN F. MacLANE,
Solicitors for Defendants and
Intervening Defendants.

REID AND PRIEST,
A. J. G. PRIEST,
Of Counsel for Defendants Electric Bond and Share Company, American Power & Light Company,
6893 National Power & Light Company and Electric Power & Light Corporation.

M. F. MILLIKAN,
Of Counsel for Defendants American Gas and Electric Company, Appalachian Electric Power Company, The Ohio Power Company, The Scranton Electric Company and Atlantic City Electric Company.
6894

Order Allowing Appeal

At a Stated Term of the United States District Court held in and for the Southern District of New York, at the United States Courthouse located at Foley Square, City, County and State of New York, on the 5th day of April, 1937. 6895

Present:

HONORABLE VINCENT L. LEIBELL,
United States District Judge.

8696

[SAME TITLE]

Each of the defendants and intervening defendants herein:

Electric Bond and Share Company
American Gas and Electric Company
American Power & Light Company
National Power & Light Company
Electric Power & Light Corporation
United Gas Corporation 6897
Power Securities Corporation
Lehigh Power Securities Corporation
Utah Power & Light Company
Nebraska Power Company
Pacific Power & Light Company
United Gas Public Service Company
Houston Gulf Gas Company
Appalachian Electric Power Company
Atlantic City Electric Company
Easton Consolidated Electric Company

Order Allowing Appeal

6898 The Ohio Power Company
Pennsylvania Power & Light Company
The Scranton Electric Company
The Washington Water Power Company
Central Arizona Light and Power Company
Indiana & Michigan Electric Company
Idaho Power Company
The Montana Power Company
Spokane United Railways
Spokane Central Heating Company
Montana Power Gas Company

6899 having prayed for the allowance of an appeal in this cause to the United States Circuit Court of Appeals for the Second Circuit from the decree dated March 6, 1937, and entered on the 8th day of March, 1937 in the above-entitled suit by the United States District Court for the Southern District of New York, and from each and every part of said decree, and having presented and filed its Petition for Appeal and Assignment of Errors and Prayer for Reversal, as provided by law:

6900 IT IS NOW HERE ORDERED that an appeal be and the same is hereby allowed as prayed for to the United States Circuit Court of Appeals for the Second Circuit in this cause as provided by law; and it is further

ORDERED that a certified transcript of record be transmitted to the United States Circuit Court of Appeals for the Second Circuit; and it is further

ORDERED that the bond on appeal be fixed at the sum of $250, and that this appeal upon being

perfected within the time allowed by law shall operate, without the defendants and intervening 6901
defendants furnishing security other than as aforesaid, as a stay of the injunction contained in said decree as to the appealing defendants and intervening defendants pending the determination of said appeal by said United States Circuit Court of Appeals or by the Supreme Court of the United States, if it shall be there removed by certiorari or other process, and until thirty days after the filing of the mandate of the appellate court in this Court.

VINCENT L. LEIBELL,
U. S. D. J. 6902

6903

Undertaking for Costs on Appeal

AMERICAN SURETY COMPANY
OF NEW YORK
ORGANIZED 1884.

Company's Home Office Building
100 Broadway, New York.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

KNOW ALL MEN BY THESE PRESENTS: That the AMERICAN SURETY COMPANY OF NEW YORK, a New York Corporation, having an office and usual place of business at No. 100 William Street, Borough of Manhattan, in the City of New York and State of New York, is held and firmly bound unto SECURITIES AND EXCHANGE COMMISSION in the penal sum of Two Hundred Fifty and 00/100 Dollars ($250.00) for the payment of which well and truly to be made to the said SECURITIES AND EXCHANGE COMMISSION and assigns, said AMERICAN SURETY COMPANY OF NEW YORK firmly binds itself, its successors and assigns, by these presents.

WHEREAS, ELECTRIC BOND AND SHARE COMPANY, AMERICAN GAS AND ELECTRIC COMPANY, AMERICAN POWER & LIGHT COMPANY, NATIONAL POWER & LIGHT COMPANY, ELECTRIC POWER & LIGHT CORPORATION, UNITED GAS CORPORATION, POWER SECURITIES CORPORATION, LEHIGH POWER SECURITIES

CORPORATION, UTAH POWER & LIGHT COMPANY, NEBRASKA POWER COMPANY, PACIFIC POWER & LIGHT COMPANY, UNITED GAS PUBLIC SERVICE COMPANY, HOUSTON GULF GAS COMPANY, APPALACHIAN ELECTRIC POWER COMPANY, ATLANTIC CITY ELECTRIC COMPANY, EASTON CONSOLIDATED ELECTRIC COMPANY, THE OHIO POWER COMPANY, PENNSYLVANIA POWER & LIGHT COMPANY, THE SCRANTON ELECTRIC COMPANY, THE WASHINGTON WATER POWER COMPANY, CENTRAL ARIZONA LIGHT AND POWER COMPANY, INDIANA & MICHIGAN ELECTRIC COMPANY, IDAHO POWER COMPANY, THE MONTANA POWER COMPANY, SPOKANE UNITED RAILWAYS, SPOKANE CENTRAL HEATING COMPANY and MONTANA POWER GAS COMPANY have prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit to reverse the decree dated the 6th day of March, 1937, rendered in the above entitled suit in the District Court of the United States for the Southern District of New York. 6907 6908

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, That if the said Petitioners shall prosecute their appeal to effect and answer all costs if they fail to make their plea good, then this obligation shall be void, otherwise to remain in full force and effect. 6909

IN WITNESS WHEREOF, the said AMERICAN SURETY COMPANY OF NEW YORK has caused its corporate seal to be hereto affixed and these presents to be signed by its duly authorized officers on the 26th day of March, 1937.

Undertaking for Cost on Appeal

AMERICAN SURETY COMPANY OF NEW YORK

6910

By:

R. J. McLaughlin
Resident Vice President.

Attest:

William Wishart, Jr.,
Resident Assistant Secretary.

203962-K

Approved by me as to form and sufficiency of surety this 5th day of April, 1937.

6911

VINCENT L. LEIBELL,
U. S. D. J.

6912

Citation on Appeal

UNITED STATES DISTRICT COURT

6913

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

By the Honorable Vincent L. Leibell, one of the Judges of the United States District Court for the Southern District of New York.

To: Securities and Exchange Commission, Plaintiff; and

6914

Homer S. Cummings, individually and as At-Attorney General of the United States,
James A. Farley, individually and as Postmaster General of the United States, and
James M. Landis,
Robert E. Healy,
George C. Matthews,
James D. Ross and
William O. Douglas, individually and as members of and constituting the Securities and Exchange Commission, Cross-Defendants.

6915

GREETING:

YOU AND EACH OF YOU, ARE HEREBY CITED AND ADMONISHED to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be held at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, forthwith on May 4th, 1937 pursuant to the appeal duly contained and filed in the Clerk's Office of the District Court of the United States for the Southern District of New York wherein

Electric Bond and Share Company
6916 American Gas and Electric Company
American Power & Light Company
National Power & Light Company
Electric Power & Light Corporation
United Gas Corporation
Power Securities Corporation
Lehigh Power Securities Corporation
Utah Power & Light Company
Nebraska Power Company
Pacific Power & Light Company
United Gas Public Service Company
6917 Houston Gulf Gas Company
Appalachian Electric Power Company
Atlantic City Electric Company
Easton Consolidated Electric Company
The Ohio Power Company
Pennsylvania Power & Light Company
The Scranton Electric Company
The Washington Water Power Company
Central Arizona Light and Power Company
Indiana & Michigan Electric Company
Idaho Power Company
The Montana Power Company
6918 Spokane United Railways
Spokane Central Heating Company
Montana Power Gas Company

are appellants and you are appellees, to show cause, if any there be, why the decree rendered against said appellants in the above entitled cause, dated March 6, 1937 and entered March 8, 1937, should not be corrected and why speedy justice should not be done to the parties in that behalf.

GIVEN UNDER MY HAND at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 5th day of April in the year of our Lord one thousand nine hundred and thirty-seven and in the one hundred and sixty-first year of the Independence of the United States of America. 6919

VINCENT L. LEIBELL,
United States Judge for the
Southern District of New York,
in the Second Circuit.

6920

Service of a copy of the foregoing Citation is acknowledged this 7th day of April, 1937.

ROBERT H. JACKSON, on behalf of all Solicitors for Appellees.

6921

Order Approving Statement of Evidence

IN THE
6922 UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Upon the annexed consent of the solicitors for the respective parties hereto and upon consideration of the premises, it is hereby

ORDERED, ADJUDGED and DECREED that
6923 the Stipulation of Facts filed in the above entitled cause on June 30, 1936 as contained in Volumes II and III of the printed record filed in said cause, be and it hereby is approved as a proper narrative statement of evidence in compliance with Equity Rule 75 for inclusion in the transcript of record on appeal from the decree of this Court filed March 8, 1937, and that said stipulation with the Exhibits as contained in Volumes IV to VII inclusive of said printed record constitute all the evidence in said cause.

6924 Dated, April 12, 1937.

JULIAN W. MACK,
United States Circuit Judge.

Consent is given to the entry of the foregoing order without notice.

ROBERT H. JACKSON,
Assistant Attorney General,
Solicitor for Plaintiff
and Cross-Defendants.

THOMAS D. THACHER,
J. F. MacLANE,
Solicitors for Defendants
and Intervening Defendants.

Praecipe

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

6925

[SAME TITLE]

To the Clerk of the United States District Court for the Southern District of New York:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Second Circuit pursuant to an appeal allowed in the above entitled cause by order filed on the 6th day of April, 1937, and to include in such transcript of record the following, and no other papers and exhibits, to wit:

6926

1. Subpoena

2. Order for leave to file amended and supplemental bill of complaint

3. Amended and supplemental bill of complaint 6927

4. Notice of motion for order allowing intervention of Appalachian Electric Power Company, *et al.*

5. Petition for intervention of Appalachian Electric Power Company, *et al.*

6. Stipulation, dated December 4, 1935, as to intervention of Appalachian Electric Power Company, *et al.*

7. Order bringing in Appalachian Electric
6928 Power Company, *et al.*

8. Stipulation, dated December 13, 1935, extending time to answer

9. Stipulation, dated January 7, 1936, extending time to answer

10. Answer of defendants and intervening defendants to the amended and supplemental bill of complaint

6929 11. Stipulation, dated January 21, 1936, as to additional parties

12. Order, dated January 22, 1936, as to additional parties

13. Bill of intervention of Central Arizona Light and Power Company, *et al.*

14. Stipulation, dated February 6, 1936, extending time to reply

6930 15. Stipulation, dated February 25, 1936, extending time to reply

16. Reply of plaintiff and cross-defendants to the counter-claim and cross-bill of the defendants and intervening defendants

17. Statement of evidence, being the Stipulation of Facts, as contained in Volumes II and III of the printed record, filed June 30, 1936

18. All exhibits filed in the above entitled cause, being Volumes IV to VII, inclusive, of the printed record, filed June 30, 1936 6931

19. Opinion rendered by the United States District Court for the Southern District of New York in the above entitled cause and filed on January 29, 1937

20. Findings of fact, conclusions of law and decree entered by said Court, dated March 6, 1937 and filed March 8, 1937

21. Petition for appeal of defendants and intervening defendants 6932

22. Assignments of errors of defendants and intervening defendants

23. Order allowing appeal and fixing amount of bond

24. Bond on appeal (omitting power of attorney)

25. Citation on appeal 6933

26. Order, dated April 12, 1937, approving the Stipulation of Facts as contained in Volumes II and III of the printed record, filed June 30, 1936, as a proper statement of evidence for inclusion in the transcript of record

27. This praecipe

said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Second Circuit, and to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit, at Foley Square, New York, N. Y., on or before the 4th day of May, 1937.

Dated: April 13, 1937.

THOMAS D. THACHER,
J. F. MacLANE,
Solicitors for all Appellants.

The above praecipe, service of which is hereby acknowledged, is hereby consented to and approved, and the record may be accordingly prepared, certified and printed without further praecipe from Appellees.

Dated: April 13, 1937.

ROBERT H. JACKSON,
Assistant Attorney General,
Solicitor for all Appellees.

Stipulation as to Transcript of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

6937

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED that the foregoing, consisting of eight printed volumes, the original of which are each identified by our initials in ink on the last printed page, is a true transcript of the record of the said District Court in the above entitled cause as agreed upon by the parties.

6938

Dated, New York, N. Y., May 1, 1937.

THOMAS D. THACHER,
JOHN F. MacLANE,
Solicitors for all Appellants.

ROBERT H. JACKSON,
Assistant Attorney General,
Solicitor for all Appellees.

6939

Clerk's Certificate

6940 IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

United States of America,
Southern District of New York, *ss.*:

6941 I, CHARLES WEISER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing, consisting of eight printed volumes, the original of each of which is initialed by me in ink on the last printed page thereof, is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the
6942 City of New York, in the Southern District, this 3rd day of May in the year of our Lord one thousand nine hundred and thirty-seven and of the Independence of the said United States the one hundred and sixty-first.

CHARLES WEISER,
Clerk.

[fol. 2315] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

ELECTRIC BOND AND SHARE COMPANY, AMERICAN GAS AND EL'CTRIC COMPANY, American Power & Light Company, National Power & Light Company, Electric Power & Light Corporation, United Gas Corporation, Power Securities Corporation, Lehigh Power Securities Corporation, Utah Power & Light Company, Nebraska Power Company, Pacific Power & Light Company, United Gas Public Service Company, Houston Gulf Gas Company, Appalachian Electric Power Company, Atlantic City Electric Company, Easton Consolidated Electric Company, The Ohio Power Company, Pennsylvania Power & Light Company, The Scranton Electric Company, The Washington Water Power Company, Central Arizona Light and Power Company, Indiana & Michigan Electric Company, Idaho Power Company, The Montana Power Company, Spokane United Railways, Spokane Central Heating Company and Montana Power Gas Company, Defendants-Appellants,

against

SECURITIES AND EXCHANGE COMMISSION, Plaintiff-Appellee, and Homer S. Cummings, individually and as attorney General of the United States, James A. Farley, individually and as Postmaster General of the United States, and James M. Landis, Robert E. Healy, George C. Mathews, James D. Ross and William O. Douglas, individually and as constituting the Securities and Exchange Commission, Cross-Defendants-Appellees.

Before Manton, L. Hand and Swan, Circuit Judges

[fol. 2316] Appeal from the District Court for the Southern District of New York. Suit by the Securities and Exchange Commission against the Electric Bond and Share Company and other utility corporations for an injunction restraining the defendants from using the instrumentalities of interstate commerce and the mails unless they register pursuant to the Public Utility Holding Company Act of 1935 (15 U. S. C. A. § 79). The answer filed contained a counterclaim asking injunctive relief. Decree for plaintiffs against the defendants; the counterclaim was dismissed. Defendant utility companies appeal. Decree affirmed.

Simpson Thacher & Bartlett, Esqs., Solicitors for Appellants; Thomas D. Thacher, John F. MacLane, of Counsel.

Homer Cummings, Attorney General.

Allen E. Throop, General Counsel, Securities & Exchange Commission.

Robert H. Jackson, Asst. Attorney General and Special Counsel, Securities & Exchange Commission.

Benjamin V. Cohen, Special Assistant to the Attorney General.

Thomas G. Corcoran, Special Assistant to the Attorney General. John J. Abt, David Cobb, Joseph A. Fanelli, David Ginsburg, Henry A. Herman, Fredk. B. Wiener, on the Brief.

MANTON, Circuit Judge:

This appeal seeks a review of a decree which enjoins the appellants from violating Section 4, subdiv. (1), (2), (3), (4) and (6) of the Public Utility Holding Company Act of 1935 (hereafter referred to as the "Act") (15 U. S. C. A. § 79d) until they cease to be holding companies or register pursuant to Section 5 (15 U. S. C. A. § 79e). The appellants have not registered and admit that they do the forbidden acts mentioned in Section 4 (a) but agree that the Act and each section thereof violates the Federal Constitution in that [fol. 2317] the legislation was beyond the limited powers of Congress. A cross bill, seeking an injunction against the enforcement of the provisions of the Act and its several sections was filed, based upon the claim of the Act's unconstitutionality. Appellants invoke the Declaratory Judgment Act (28 U. S. C. A. § 400) in an effort to have each section of the statute declared invalid. Cross-defendants appeared and sought a dismissal of the cross-bill.

This suit is authorized by Section 18(f) of the Act. Appellants American Gas and Electric Company, American Power & Light Company, National Power & Light Company, Electric Power & Light Company, and United Gas Corporation were subsidiaries of the Electric Bond and Share Company, which owned or controlled all their stock, and were the original defendants. Sixteen other holding companies in the bond and share system intervened. Seven of these, by the rule of the Commission, were exempted from all duties and liabilities under the Act as holding companies, and two have ceased to be holding companies after acquiring all the

properties of said subsidiaries. There remain as defendants, and now appellants, by intervention, the Power Securities Corporation, a subsidiary of Electric Power and Light Corporation; the Lehigh Power Securities Corporation, a subsidiary of the National Power & Light Corporation; the Utah Power & Light Company, a subsidiary of the Electric Power & Light Corporation; United Gas Public Service Company, a subsidiary of the United Gas Corporation; Houston Gulf Gas Company, a subsidiary of United Gas Public Service Company; the Nebraska Power Company, a subsidiary of the American Gas and Electric Company; and the Pacific Power & Light Company, a subsidiary of the American Gas and Electric Company. All but the first two of these [fol. 2318] are operating and holding companies. Cross defendants named who are now appellees, are Government officials, the Attorney General and Postmaster General and members of the appellee Commission, who are to administer the enforcement of the Act.

A lengthy stipulation of facts has been agreed upon from which the court below made its findings.

The Act is entitled "control of Public Utility Holding Companies". It provides a series of regulations to be enforced by the Security—Exchange Commission "to meet the problems and eliminate the evils * * * connected with public utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce * * *." Section 1(c). There are provided groups of regulations covering subjects such as: registration (§§ 4, 5); issue and sale of securities (§§ 6, 7); acquisition of securities and utility assets (§§ 8, 9, 10); corporate simplification and reorganization (§ 11); service contracts and other inter-company transactions (§§ 12, 13); and reports and accounts (§§ 14, 15). Other sections of the act provide for the administration and enforcement of these regulatory provisions.

Congress found that a utility company is affected with a public interest, as is a company which controls and dominates a public utility company, and is subject to restraint and control for the public good. West Coast Hotel Co. v. Parrish, 300 U. S. 379; Nebbia v. New York, 291 U. S. 502. And Section 1 declares that such companies are affected with a national public interest when they build up and maintain control over operating companies by the use of the mails and channels of interstate commerce. Accordingly, Con-

[fol. 2319] gress employed in this statute its authority to prevent the evils and abuses found by a report of the Federal Trade Commission (Report of Federal Trade Commission, U. S. Senate Document #92, part 73a, pp. 31-36, 41-58, 205-218) to exist in the use of the mails and the channels of interstate commerce. Brooks v. United States, 267 U. S. 432; In re Rapier, 143 U. S. 110.

The Act is directed to the corporate and financial relationships and dealings between or affecting the holding company organized in one state and its subsidiaries which are not confined to that state. It is aimed at the holding company whch controls operating utilities in states other than its domicile and which utilizes the channels of interstate commerce. The Commission is expressly directed to exempt a holding company and its subsidiaries from the provisions of the act if the holding company system is predominently intrastate in character and within the effective control of a single state (§ 3[a][1]). The kind of holding company which falls within the act, it is said, "transcends state lines and is national in its scope and importance * * * and subjects it to the control of the commerce clause." Fisher's Blend Station Inc. v. State Tax Commission, 297 U. S. 650, 655.

The recitation of abuses contained in Section 1(b) and found to be fostered and perpetuated by the use of the national channels of commerce, finds support in the report of the Federal Trade Commission to the Senate.* These [fol. 2320] findings point out that the unsound capitalization of holding companies operate to the detriment not only of widely scattered investors, but also to the consumers of the utility products of the underlying operating companies. The Federal Trade Commission has found that holding companies have frequently been under pressure to squeeze the greatest possible revenue out of the operating

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* 1R. 393-394; House Hearings on H. R. 5423, 74th Cong., 1st Sess., pp. 1129-1132. See also Federal Trade Commission reports for proof that interests of investors, consumers and general public have been promoted by Bond and Share, American Gas and other defendants: F. T. C. Reports, Pt. 22, p. 636; Pts. 23 and 24, pp. 418, 419; Pt. 72-A, pp. 700-706, 832-840, 881; Pt. 84-A, p. 570.

Report of the Federal Trade Commission to the U. S. Senate, 70th Congress, 1st Session, Senate Doc. No. 92, Part 72-A, p. 143.

companies and they have resisted voluntary rate reductions which might have strengthened those subsidiaries and increased the consumption of gas and electricity. The Federal Trade Commission report also found that they have sought unfair profits through a variety of intercompany transactions; that they have obstructed state regulations through their control of accounting practices and financial policies of their operating companies; and that they have frequently brought into common control widely distant utility facilities in disregard of economical management through the integration and co-ordination of related properties. Such holding companies have been found to be beyond the practical and legal power of the states.

Within Section 2(a)(7) defining terms, a "holding company" is a company which actually controls operating companies and not a company which merely has an investment in an operating company. A "subsidiary company" is one (§ 2[a][8]) which is actually controlled by a holding company. The duties imposed by the substantive provisions of the Act apply only to a holding company which is not entitled to exemption under Section 3.

Section 4(a) provides that where a holding company maintains its control over subsidiaries and carries on its business through federal channels of communication or of [fol. 2321] commerce, the controlling company must register under Section 5. To meet the evils referred to in Section 1, the Act (§ 4[a]) requires utility holding companies to register with the Commission, if they transmit electric energy or gas in interstate commerce (§ 4[a][1]); or if they use the mails or channels of interstate commerce to conduct certain types of transactions with their subsidiaries or other utility companies (§ 4[a][2]) to market their securities (§ 4[a][3]); to increase their holdings in their subsidiary companies or in other utility enterprises (§ 4[a][4]); or if they otherwise engage in business in interstate commerce (§ 4[a][5]); or if they engage in any of such interstate activities through the agency of a subsidiary company which they dominate and control (§ 4[a][6]).

By registration is meant the filing of a notification as provided by Section 5(a) and the company so registered is thereafter required to file with the Commission such pertinent information of the character described in Section 5(b) as the Commission may require. Section 4(b) re-

quires a holding company, which has publicly distributed, by means of the mails or interstate commerce an issue of securities subsequent to January 1, 1925, to register under Section 5 (15 U. S. C. A. 78e), if such securities are still outstanding among investors in the several states. Section 5 provides for the filing by registered companies of registration statements containing information concerning their capitalization, business and relations with subsidiaries. These registration provisions supplement and extend the informatory requirements of the Securities Act of 1933 (48 Stat. 74) and the Securities Exchange Act of 1934 (48 Stat. 881).

[fol. 2322] Registered companies must file with the Commission pertinent information regarding new securities issued (§§ 6, 7). New issues must be stopped by the Commission if they do not meet appropriate standards of fairness and honesty fixed by the Act (§§ 6, 7). The acquisition of utility securities or assets by registered companies and their subsidiaries must be approved by the Commission as meeting certain standards specified in the Act (§§ 9, 10); registered companies cannot acquire properties which bear no relationship to the properties they already possess; they cannot burden themselves with new acquisitions at prices which bear no relation to the earning power of or the sums actually invested in the properties to be acquired. New acquisitions must be economically appropriate to and fit in with the major utility enterprise of the acquiring companies; they must meet accounting requirements set by the commission (§ 15). Comprehensive regulations of the transactions between the companies within a holding company system and between such companies and interests affiliated with them and their dealings are controlled by Sections 12 and 13. Abuses arising out of loans by subsidiaries to controlling holding companies are prohibited. The service, sales and construction contracts by which holding companies have in the past obtained profits at the expense of the investor in the operating companies and its utility consumers are also regulated. The Act permits such intra-system services to be performed for utilities under a holding company's control only at cost and subject only to such limitations as the Commission finds appropriate in the public interest and for the protection of investors and consumers. These are abuses pointed out in the Federal Trade Commission report to the Senate. Section 11

[fol. 2323] provides that as soon as practicable after January 1, 1938, the Commission shall, after notice and hearing, direct that every registered holding company which does not become a true investment company shall, within a specified period, confine its interest to a "single integrated public utility system"; that they simplify their corporate structure and distribute voting power equitably among their security holders. The purpose of this section is said to be to confine holding companies to their functions in the operation of integrated properties, to end speculative ventures of high finance and forbid pyramiding structures and special mechanisms for disfranchising security holders of a voice in the management of their investments. All orders of the Commission can be made only after opportunity for a hearing (§ 20[c]) and are subject to judicial review (§ 24).

Whether the registration provisions of the Act are constitutional depends upon the power of Congress to require a public utility holding company engaged in interstate commerce, either directly or through its subsidiaries, to file information regarded by the Congress as important in the public interest for the protection of investors and consumers.

The appellee argues that the federal power over interstate commerce and the mails is not limited to the protection of the channels of interstate commerce from danger of obstruction but extends to the prevention of their use for a purpose or in a manner contrary to sound public policy. Appellee also contends that the federal power over interstate commerce and the mails is not abridged because the use of such channels of intercourse is incidental or is not the major activity of the user.

[fol. 2324] Congress has long exercised, and the courts have sustained, the federal power to prevent the facilities of interstate commerce and the mails from being used to accomplish ends inimical to the general welfare. This legislation is concerned with the power of the Federal Government to control in the public interest the flow of commerce and intercourse through these channels. But not to the extent that the Government may impose a collateral obligation upon the person responsible for the flow. The latter question depends upon the particular relationship of the obligation to and its influence upon that flow. Carter v. Carter Coal Co., 298 U. S. 238; Bd. of Trade etc. v. Olsen,

262 U. S. 1; Stafford v. Wallace, 258 U. S. 495; United States v. Ferger, 250 U. S. 199. Such questions may arise when the validity of other portions of the Act is presented to a court, but are not here involved in the consideration of the registration provisions because these sections are directly confined to certain regulations of the use of the channels of interstate commerce and the use of the mail facilities. No holding company need register unless it makes specified uses of the mails and instrumentalities of interstate commerce. A holding company whose interests and business are predominantly intrastate need not register even though it makes use of the mails and the channels of interstate commerce.

Congress has, within the scope of the powers delegated to it by the Constitution, the same full power in its domain that the States enjoy in their domain to employ such regulatory devices as are deemed reasonably adapted to the public welfare. Hamilton v. Ky. Distilleries Co., 251 U. S. 146, 156. It has been referred to as "police power for the benefit [fol. 2325] of the public, within the field of interstate commerce." Brooks v. United States, 267 U. S. 432, 436. "We have frequently said that in the exercise of its control over interstate commerce, the means employed by the Congress may have the quality of police regulations." Kentucky Whip & Collar Co. v. I. C. Ry. Co., 299 U. S. 334, 346. This police power under the commerce clause was fully considered in the Lottery Case (188 U. S. 321) and it was decided that lottery tickets are subjects of interstate commerce contrary to the argument that the prohibition or permission of lotteries was a matter reserved to the states by the Tenth Amendment. Congress can prohibit the interstate transportation of live stock known to be infected with contagious disease (M. K. & T. Ry. v. Haber, 169 U. S. 613; Reid v. Colorado, 187 U. S. 137); provide requirements for inspection and dipping of cattle which are likely to range across state lines (Thornton v. United States, 271 U. S. 414); make it unlawful to ship in interstate commerce foods and drugs unless they are unadulterated and properly labeled (Pittsburg Melting Co. v. Totten, 248 U. S. 1; Weeks v. United States, 245 U. S. 618; McDermott v. Wisconsin, 228 U. S. 115, 128). The White Slave Traffic Act (36 Stat. 825) was sustained even where no commercial vice was involved (Caminetti v. United States, 242 U. S. 470). So too, the National Motor Vehicle Theft Act (41 Stat. 324), punishing

the interstate transportation of stolen motor cars (Brooks v. United States, 267 U. S. 432); also the regulation and transportation of prison made goods (Whitfield v. Ohio, 297 U. S. 431). As said by the Supreme Court:

"Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such [fol. 2326] commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin." Brooks v. United States, 267 U. S. 432, 436.

Nor is the police power within the field of interstate commerce limited to prohibiting the transportation of articles that are themselves harmful. The stolen motor car involved in the Brooks case was not in itself different from an automobile lawfully acquired. There was nothing harmful or immoral about prison made goods, governed by the Hawes-Cooper Act, involved in Whitfield v. Ohio (supra), or in the oil regulated by the Connally Act (Griswald v. President etc., 82 Fed. 2, 922 (C. C. A. 5). In each of these statutes, as in the registration provisions of this Act, it was held, Congress conditioned particular uses of the channels of interstate commerce upon certain safeguards to prevent those uses from being made the instruments of causing evil or harm in a state other than the state of origin, even though the articles or communications transported might not be inherently harmful. The use of the channels of interstate commerce, regulated by Congress, has been an essentially business or commercial use. The courts have never regarded the innocence or harmfulness of the mere physical movement of persons, goods or communications as determinative of the limits of Congressional power, so long as the activities regulated were genuinely honest in character. The Securities Act of 1933 and the Securities Exchange Act of 1934 make it unlawful to use the mails or channels of interstate commerce without complying with regulations prescribed by the Commission in respect of certain transactions in securities. We held this a valid exercise of Con-[fol. 2327] gressional power. Jones v. S. E. C., 79 Fed. 2, 617 (C. C. A. 2), reversed in 298 U. S. 1 on other grounds; Coplin v. United States, 88 Fed. 2, 652 (C. C. A. 9); S. E. C. v. Torr, 15 Fed. Supp. 315 (D. C. SD. N. Y.) reversed, 87 Fed. 2, 446 (C. C. A. 2), on other grounds.

In Kentucky Whip & Collar Co. v. I. C. Ry. Co., (299 U. S. 334, 347) the court said:

"And, while the power to regulate interstate commerce resides in the Congress, which must determine its own policy, the Congress may shape that policy in the light of the fact that the transportation in interstate commerce, if permitted, would aid in the frustration of valid state laws for the protection of persons and property."

Even when regulating activities not in interstate commerce but which directly affect such commerce, the federal power may be exercised to control innocent as well as harmful transactions so as to insure that the innocent shall not be perverted into the pernicious. Stafford v. Wallace, 285 U. S. 1.

Congress cannot, of course, exercise the commerce and mail powers to meet evils which are not spread or perpetuated by the use of the channels of interstate commerce or the mails. Hammer v. Dagenhart, 247 U. S. 251.

The power of Congress over the mails is not limited to the protection of facilities of the mails. It may be exercised to prevent the use of the mails for purposes which it deems objectionable to sound public policy. This power probably may be regarded as even more comprehensive than that exercised over interstate commerce for the government's [fol. 2328] interest in the mails is proprietary as well as regulatory. Stephenson v. Binford, 287 U. S. 251; Ellis v. United States, 206 U. S. 246; cf. Atkin v. Kansas, 191 U. S. 207.

The use of the mails has been denied to those engaged in a fraudulent scheme (Public Clearing House v. Coyne, 194 U. S. 497; Ex parte Jackson, 96 U. S. 727); it has been denied for mailing obscene matters (Grimm v. United States, 156 U. S. 604); it may cause newspapers or periodicals to make regular statements of ownership and extent of their circulation for the use of the mails (Lewis Pub. Co. v. Morgan, 229 U. S. 288); "* * * it must be left to Congress in the exercise of a sound discretion to determine in what manner it will exercise the power it undoubtedly possesses" (In re Rapier, 143 U. S. 110, 134).

In considering the particular provisions of Section 4(a) and the nature of the transactions there subjected to regulation, it becomes evident that the evils which the Congress

sought to meet are made possible and are spread by the use of the federal channels of commerce. In respect of the sale of securities, the harm reached by the Act is to investors.

Holding companies are not immune from federal statutes regarding the use of the mails and instrumentalities of interstate commerce merely because some or even a major part of their activities or the activities of their local subsidiary operating companies may be intrastate. No constitutional doctrine limits the federal power over the mails and channels of commerce to the enactment of statutes which apply only to persons whose principal business is [fol. 2329] carried on in interstate commerce or by the use of the mails.

Section 4(a)(1) provides that it shall be unlawful for non-registered holding companies "to sell, transport, transmit, or distribute, or own or operate any utility assets for the transportation, transmission, or distribution of, natural or manufactured gas or electric energy in interstate commerce." Congress has paramount authority to regulate the transmission or sale for transmission of gas and electric energy across state borders. Utah Light & Power Co. v. Pfost, 286 U. S. 165, 182; Penn. Gas Co. v. P. S. C., 252 U. S. 23, 29. A sale of gas or electric energy is a sale in interstate commerce whether title passes at the state border (Peoples Natural Gas Co. v. P. S. C., 270 U. S. 550) or in the state of destination (State Tax Comm. v. Interstate Natural Gas Co., 284 U. S. 41). From the stipulation it is clear that the appellants were engaged in interstate commerce in their transmission and sale across state lines of electric energy and gas, and Congressional regulation of such interstate business is in no way dependent upon the relative amounts of interstate or intrastate business done. Public Utilities Comm. v. Attleboro Steam & Elec. Co., 273 U. S. 83. So too, the power of Congress cannot be circumvented by the creation of a corporation which, while not technically itself in interstate commerce, controls the instruments of that commerce. Northern Securities Co. v. United States, 193 U. S. 197. The federal government need not suffer the continuance, or permit the development of financial superstructures upon instrumentalities of interstate commerce which impair or tend to impair their credit or their effectiveness to serve both the investing and

consuming public. cf. N. Y. Central Securities Corp. v. [fol. 2330] United States, 287 U. S. 12; Fed. Trade Comm. v. Western Meat Co., 272 U. S. 554. Therefore, if a holding company obstructs the conduct of interstate commerce in contravention of policies which Congress deems vital to the public interest, the offense is not mitigated by a showing that it also obstructs a larger amount of intrastate commerce. This registration requirement involves only the right of the government to demand that a holding company which itself, or through a subsidiary company under it, controls, sells, or transmits electric energy or gas in interstate commerce, shall inform the Commission of its activities and its interests.

By Section 4(a)(2) after December 1, 1935, a nonregistered utility company may not lawfully use the mails or instrumentalities of interstate commerce "to negotiate, enter into, or take any step in the performance of, any service, sales, or construction contract undertaking to perform services or construction work for, or sell goods to, any public-utility company or holding company." This requires holding companies whose activities are not confined to a single state to register if they use the mails or channels of interstate commerce to make or perform services sales or construction contracts with either operating or holding companies. Undoubtedly service fees paid by local utilities are charged to operating costs by the utilities and are reflected as they should be, when legitimate and commensurate with the services rendered, in the rates charged to the public. Construction fees are charged either to maintenance or capital account and are reflected in the base rate or in operating costs. When the holding company dictates the terms upon which it will perform these [fol. 2331] services for its own operating companies, the latter has neither the power nor the incentive to seek the services of a possible lower bidder. The discussions in Congress* show its intent on this subject. Moreover, the Federal Trade Commission in its investigation found that the national public interest may be adversely affected when holding companies and their subsidiaries enter into these

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* Hearings before the Committee on Interstate Commerce, U. S. Senate, 74th Congress, First Session on Senate 1725, 868.

service contracts in the absence of arms-length bargaining and without the restraint of independent competition. The suggestion that the power of the federal government over interstate commerce is limited to the regulation of trade in or the movement of tangible commodities which are the subject of barter and sale has been repudiated. Associated Press v. N. L. R. B., 301 U. S. 103; Internatl. Text Book Co. v. Pigg, 217 U. S. 91, 107; Internatl. Text Book Co. v. Peterson, 218 U. S. 664.

There has been formed for such service, the Ebasco and American Gas for the subsidiary companies of the Electric Bond and Share, and these are not any the less engaged in interstate commerce than the corresponding courses of instruction conducted by the International Text Book Company or the Clearing House of News conducted by the Associated Press.

But like the other evils or misuses pointed out in the mail frayd and prison goods cases, Congress may not have the power to eradicate these evils, but it does have the power to stop the spread of such evils through the channels of commerce which are subject to its control. Scrutiny [fol. 2332] and probing of intercorporate relationships in the utility field are not beyond the legitimate powers of government acting within its designated jurisdiction. Since Congress was satisfied from reports to it that by performance of these services for utility holding companies, the federal channels of commerce had been abused by improvident contracts, there is no authority which denies the federal power specifically to provide that the future channels of intercourse should not be utilized in any manner detrimental to the public generally. The primary purpose of this regulatory enactment is not to punish abuse but to prevent its occurrence. Registration therefore becomes a protective requirement.

By Section 4(a)(3) a nonregistered utility holding company may not distribute or make any public offering for sale or exchange of any security of such holding company or affiliate of such holding company, any public utility company, or any holding company, by the use of the mails or any means of instrumentality of interstate commerce, or to sell any such security having reason to believe that such security, by the use of the mails or any means of instrumentality of interstate commerce, will be distributed

or made the subject of a public offering. Registration will make available to the Commission pertinent information regarding the business and activities before making a public offering through the channels of interstate commerce of the holding company's own securities or those of any of its subsidiaries. Unregulated public distribution of securities by utility holding companies through the mails and channels of interstate commerce, has been found to cause widespread disaster to investors throughout the country. Excessive capitalization represented by such [fol. 2333] securities has been an obstacle to rate reductions. Holding companies have offered to the public not only their own securities but those of their subsidiaries and such public holding companies' securities are the very essence of the holding companies' business, as the court below found.

If Congress has the power to compel a holding company to register when it makes a public offering of securities through the mail or interstate channels, it also has the power to compel a holding company to register if it sells a security having reason to believe that such security by the use of the mails or other means or instrumentality of interstate commerce, will be distributed or made the subject of a public offering. The registration requirements here are similar to the requirements for registration of securities under the Security Act of 1933 as amended in 1934.

By Section 4(a)(4) a nonregistered company is forbidden the use of the mails or any instrumentality of interstate commerce, to acquire or negotiate for the acquisition of any security or utility assets of any subsidiary company or affiliate of such holding company, any public utility company, or any holding company. Acquisition of utility securities and assets forms the basis of utility holding company finance. The proceeds of public offerings are used to finance these companies. Dangerous securities flow from unsound and unwise acquisitions. In this connection, such acquisitions result in write-ups which lead to the issuance of securities upon the basis of fictitious and unsound asset values having no fair relation to the sums invested or the [fol. 2334] earning capacity of the properties. It is by this section intended to regulate such evils. Effective security regulation becomes impossible when the acquisitions to be financed have already been consummated. To acquire and

hold together under common control various utility properties and securities is one of the very reasons for a holding company's existence. This purpose is possible and can be financed only if the holding company is able to issue and sell through the mails and in interstate commerce its own securities to the public, thereby securing the funds with which to acquire the properties. When they can acquire utility assets and securities at prices extravagently higher than those justified by the earning capacity of the acquired properties, the holding company's own securities cannot be sound and the investors are injured. So too, the interests of the consumers are at stake. Unsound acquisitions on the part of a holding company are detrimental to the industry. The need of regulation of such activities has been found to exist by Congress. And it is within the power of Congress to regulate these channels to guard against and expost financial abuses which bring ruination to many.

By Section 4(a)(6) an unregistered holding company may not lawfully own, control or hold with power to vote, any security of any subsidiary company thereof that does any of the acts enumerated in paragraphs 1 to 5, inclusive, of this subsection. A ten per cent stock ownership creates a presumption of control. The Act provides (§2[a][8]) that the Commission upon application shall declare a company not to be a subsidiary company if it finds that it in fact is not controlled by the holding company. By Section 2(a)(7) [fol. 2335] any company that is prima facie a holding company under the Act can rebut the presumption by showing that in fact it does not control subsidiary utility companies. The presumption provided for is neither arbitrary nor unreasonable as Congress could find upon the report of the Federal Trade Commission.* Practical control is often exercised and retained, through the ownership by those who are already in managerial control of a substantial minority of the voting power. The majority stock is not necessary for control. United States v. Union Pac. Ry. Co., 226 U. S. 61, 95-96.

By Section 4(a)(6) Congress has not attempted to disregard the corporate entity of any corporation. The provisions of the Act which regulate the relations between the holding company and its subsidiary take into full account

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* 70th Congress, First Session, Senate Document 92, para. 72-a, p. 143.

the existence, separation and protection of such entities. Congress has found that in certain situations the proper regulation of interstate commerce and postal activities of the subsidiary requires the regulation of the controlling company. "It is with the system that the law must deal, not with its elements." So. Pac. Terminal Co. v. I. C. C., 219 U. S. 498, 523.

Congress has heretofore attempted to meet the evils of the holding company's device by appropriate legislation. The Emergency Transportation Act [1933] (48 Stat. 217) provides for the regulation of railroad holding companies; the Banking Act of 1933 (48 Stat. 186) provides for extensive regulation of bank holding companies. The validity of [fol. 2336] these regulations depends upon the effect which a holding company has upon its subsidiary companies and acts of its subsidiary companies which are themselves within the scope of the Congressional power. United States v. Reading Co., 226 U. S. 324; Northern Securities Co. v. United States, 193 U. S. 197. These powers cannot be defeated by legal subterfuges. So § 4(a)(6) is necessary to deal with economic actualities and to prevent the circumvention of the will of Congress within its appointed sphere of control over interstate commerce. Northern Securities Co. v. United States, supra.

Appellants contend that the registration provisions of the Act violate the due process clause granted under the Fifth Amendment. Holding companies' management of necessity have dual and often inconsistent obligations toward their own and their subsidiary security holders. Such legislation covering holding companies in the banking field and the railroad field has been pointed out. Taxation heavy enough to discourage or break up multiplication of units under the common corporate control has been sustained. Fox v. Standard Oil of N. J., 294 U. S. 87. Holding companies controlling electric and gas companies which are local monopolies not subject to the normal restraints of competition, may readily and reasonably be distinguished from other holding companies. But a distinction in legislation is not arbitrary "if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78. It is unnecessary that the legislative authority exerted in the proper field embrace

[fol. 2337] all the evils within its reach. The Constitution permits cautious advance, step by step, in dealing with the evils which are exhibited in the activities within the range of the legislative power. N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 11, 46.

The contention regarding denial of due process in registration provisions rests upon the claim that some of the exemptions for holding companies provided in §3(a) are arbitrary. But as we have pointed out, each exemption has a very real and practical basis and evidences the desire of Congress not to exert its power over the mails and channels of interstate commerce beyond what seems to be essential in the national public interest.

It is also contended that the registration provisions involve an unconstitutional delegation of power. It is suggested that the power given the Commission under §2(a)(7) to relieve a holding company from a prima facie presumption of control which springs from a specified percentage of stock ownership is an unconstitutional delegation of power. The provision directs the Commission, after a notice and hearing, to declare a company not to be a holding company if it finds that it does not exercise such control or controlling influence over operating utility companies as to make it necessary to be treated as a holding company or controlling company in order to protect the public or investors or consumers from the evils at which the act is directed. Congress found it impracticable to put upon the Commission the burden of making a specific determination and control for each and every holding company before that company could be deemed a holding company and required to register. Congress s-lected the ele-[fol. 2338] ment of stock ownership, a factor most usually indicative of control as prima facie evidence of control. The burden of proof, which is cast upon the utility company to prove otherwise, is not onerous. Judicial review is provided to guard against any arbitrary action on the part of the Commission and to afford a remedy should the Commission's finding be not supported by substantial evidence. Section 24(a).

Congress has promulgated a series of laws regulating the financial activities of utility holding companies within the scope of the federal power to assure their being conducted in accordance with definite standards prescribed by it. To

facilitate the application of these standards, Congress has directed their administration by an administrative commission. The standards of the act are sufficiently specific and definite and should be upheld. N. Y. Central Securities Corp. v. United States, 287 U. S. 12; Federal Radio Comm. v. Nelson Bros., 289 U. S. 266.

The registration provisions of this Act are separable from the remainder of the Act. There is a presumption of separability raised by §32. Section 32 is a command by Congress that valid fragments must be preserved if the warp and woof are torn away. Dorchy v. Kansas, 264 U. S. 286, 290. It creates a presumption that the Congress would have been satisfied with what remained if parts were invalid. Carter v. Carter Coal Co., 298 U. S. 238, 334; Champlain Refining Co. v. Corporation Comm., 286 U. S. 210, 235. The provisions of the Act designed for control by informatory methods constitutes a functional integrated whole which is susceptible of enforcement without regard to many other sections of the Act and there is no reason inherent in the statute itself, why the registration provisions cannot [fol. 2339] be applied standing alone. Therefore, we hold §4(a) and §5 to be constitutional.

The cross-bill of necessity is closely connected with the consideration of the separability question. Holding, as we do, that the registration provisions are separable from the control provisions, the cross-bill was properly dismissed. The cross-bill seeks an adjudication on all sections of the Act applicable only to registered holding companies, and the appellants have not registered. Such an adjudication would amount to an advisory opinion on a mythical state of facts.

The cross-bill seeks first an injunction restraining the enforcement of the Act, and second, a declaratory judgment that it is void and unconstitutional in its entirety. The cross-bill is concerned only with the provisions of the Act which deal with registered holding companies since the bill and answer provide ample opportunity to decide the issues presented by §4(a) and §5 of the registration sections. As appellants have not registered, the cross bill seeks an advisory opinion as to their rights and duties under the Act if and when they register. This merely poses a variety of hypothetical controversies which might arise if the appellants would give up their status as nonregistered holding

companies, and if, therefore, they do conduct their affairs as to come into contact with one or more provisions of the Act if the appellee thereafter should attempt to enforce such provision or provisions of the Act against them. Until they actually become registered companies and until they contemplate a particular course of conduct which is prescribed by the provisions of the Act applicable to them, the appellants can present no controversy to the court on any pro-[fol. 2340] vision of the Act. No matter what their grievance against Congress may be, the appellants have no controversy with the Commission or any individual cross-defendant over these provisions of the statute which deal with registered companies.

There is no actual controversy presented such as is required by the declaratory judgment act (28 U. S. C. A. 400) and it does not apply. Aetna Life Ins. Co. v. Haworth, 300 U. S. 227; Ashwander v. Tenn. Valley Asso., 297 U. S. 288; United States v. W. Va., 295 U. S. 463, 475.

The appellants have no right to an injunction since they have no threats to enforce the provisions of the Act dealing with registered companies. Spielman Motor Sales Co. v. Dodge, 295 U. S. 89; Mass. v. Mellon, 262 U. S. 447; Ex parte LaPrade, 289 U. S. 444.

Mere allegations of irreparable injury will not suffice to warrant an injunction. Facts must appear on which the allegation is predicated in order that the court may be satisfied of the nature of the injury. Argumentative allegations or inferences from facts are insufficient. Millikin v. Stone, 16 Fed. 2, 981,984 (C. C. A. 2).

Decree affirmed.

Judge L. Hand concurring in opinion;
Judge Swan concurring in result.

[fol. 2340½] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Electric Bond & Share Co. v. S. E. C. (Copy.) Opinion. Manton, Circuit Judge.

[fol. 2341] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION, Appellee,

against

ELECTRIC BOND AND SHARE COMPANY et al., Appellant

L. HAND, Circuit Judge (Concurring):

It seems to me doubtful whether §§4 and 5 could stand alone if all the rest of the statute were stripped away; I do not say that they could not, but I prefer what seems to me a safer ground on which to affirm the decree. Sections 6 and 7 lay out a system of control over the issuance and sale of securities; §§9 and 10, over their acquisition. I am by no means sure that all parts of these sections are valid; for example, those which forbid the use of other means ("or otherwise"), than the mails and interstate commerce; again, some of the regulatory discretions vested in the Commission. But when all these doubtful provisions are deleted, a workable system of controls would still be left, which §5 would implement. Section 4 is not merely a sanction in terrorem, to procure obedience to this system; the controls may be read as conditions upon the exercise of the activities which the section specifies. This is plainly true as to subdivisions three and four; and the relation between the controls of §§6, 7, 9 and 10 and subdivision one is direct enough. The securities issued or acquired by a holding company or a subsidiary which it controls, may certainly have an effect upon the service rendered, and es-[fol. 2342] pecially upon the rates. Indeed, it is held in many quarters that an effective regulation of rates is impossible without some control over the issuance and acquisition of securities. The relation between those activities and "servicing contracts" proscribed by subdivision two is indeed less direct; undoubtedly the subdivision relates principally to §13, but it seems to me that there is more than a fanciful relation between the credit of a company—as represented by its securities held or issued—and the services which it renders to another utility company. The pressure to exact exorbitant terms will depend in some measure upon that credit; so too its ability to perform and the character of the performance. Therefore even though

§13 were void, which I do not suggest, I should say that subdivision two might stand.

[fol. 2342½] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Securities and Exchange Com'n, Appellee, against Electric Bond & Share Co., et al., Appellant. Concurring Opinion. L. Hand, C. J.

[fol. 2343] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of November, one thousand nine hundred and thirty-seven.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Thomas W. Swan, Circuit Judges.

SECURITIES AND EXCHANGE COMMISSION, Plaintiff-Appellee,

vs.

ELECTRIC BOND AND SHARE COMPANY et al., Defendants-Appellants

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 2344] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Securities and Exchange Commission vs. Electric Bond and Share Company, et al. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 15, 1937. William Parkin, Clerk.

[fol. 2345] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 2344, inclusive, in 8 volumes contain a true and complete transcript of the record and proceedings had in said Court, in the case of Securities and Exchange Commission, Plaintiff-Appellee, against Electric Bond and Share Company, et al., Defendants-Appellants, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this twenty-second day of November, in the year of our Lord one thousand nine hundred and thirty-seven, and of the Independence of the said United States the one hundred and sixty-second.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals. Second Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 3, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered and the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.